SUPREME COURT OF THE UNITED [illegible]

OCTOBER TERM, [illegible]

No. [illegible]

J. L. HOWARD, ALIAS FRANK THOMPSON, [illegible] ALIAS GONEZ BONO, AND H. D. HAWLEY, [illegible] LANTS,

vs.

CAPTAIN J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED APRIL [illegible], 1900.

(18,511.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 312.

J. L. HOWARD, ALIAS FRANK THOMPSON; A. L. DALY, ALIAS GONEZ BONO, AND H. D. HAWLEY, APPELLANTS,

vs.

CAPTAIN J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1902.

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1 In the United States Circuit Court for Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

Be it remembered that on December 18th 1901 the petitioners above named applied to the Honorable Thomas R. Purnell, United States district judge for the eastern district of North Carolina, sitting as judge of the circuit court of the United States for the said district for a writ of *habeas corpus* upon their petition entitled in said United States circuit court for the eastern district of North Carolina and addressed to said the Honorable Thomas R. Purnell judge of said court and against Capt. J. M. Fleming, warden of the penitentiary of North Carolina, defendant; and which said petition was further in the words as follows that is to say:

"Your petitioners, J. L. Howard, A. L. Daly and H. D. Hawley, respectfully represent that they are citizens of the United States in this, to wit: That your petitioners, J. L. Howard and A. L. Daly are residents of the city of Chicago and State of Illinois, and your petitioner, H. D. Hawley, is a resident in and citizen of the State of New York; and that they are unjustly and unlawfully detained by Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, situated at the city of Raleigh therein, by virtue of a mittimus or warrant of commitment issued by John J. Nelson, clerk of the superior court of Guilford county, in the State of North Carolina, and, as it is said, under the following circumstances, that is to say:

"At the June term, 1901, of the superior court of the county of Guilford, State of North Carolina, there was holden a session of said court and at the opening day thereof there was present to preside in and over said term of said superior court the Honorable W. B. Council, judge of the superior court of North Carolina, holding the courts of the fifth judicial district as the same was constituted prior to the first day of last July and in which district the county of Guilford was included; that the further organization of said court consisted of a drawing and empaneling of a grand jury and the drawing and empaneling of certain petit juries, but that neither the said grand jury nor any of the said petit juries were drawn and empaneled according to law. On the contrary, they were drawn in a manner contrary to and forbidden by the statute laws of this State. The law of this State provides that in each county a jury-box shall be kept, with two divisions, marked respectively No. 1 and No. 2, and that the county commissioners at stated intervals shall place the names of persons residing in said county, eligible and qualified for jury duty, and that the juries for each term of court shall be drawn indiscriminately from box No. 1, and, after service upon the jury at the term of court for which they were drawn, the

names of said persons shall be placed in box No. 2. The jurors drawn for service at the term of court aforesaid were not drawn indiscriminately from box No. 1, but were selected by the county commissioners from certain township boxes which the said commissioners had theretofore prepared. That there was no general mixing of the names of all the persons eligible for jury duty, nor was there in fact any mixing at all, but each township box was taken out by the county commissioners and certain names contained in the township boxes selected by the commissioners, and the venire so drawn was summoned for
2 attendance and did attend at the said term of said court, and the grand jury empaneled at the said term of said court was drawn from the venire selected as aforesaid, and to a large extent the petit juries also, contrary to section 13 of article 1 of the constitution of North Carolina, and to sections 1726 and 1727 of the Criminal Code of said State, and contrary and in violation of section 1, article 14, and section 1, article 15, of the Constitution of the United States. And that the said superior court of Guilford county, in drawing the jurors aforesaid and empaneling thereof the said grand jury for the said term of said court, by whom your petitioners aver the bill of indictment herein set out was found and returned unto said court as and for a true bill, an indictment in words and figures as follows:

"STATE OF NORTH CAROLINA,
Guilford County.

"Superior Court, June Term, A. D. 1901.

"The jurors for the State, upon their oath, present that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22d day of March, A. D. 1901, with force and arms, at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud among themselves unlawfully, wilfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together to divers false pretences and subtle means and devices, to obtain from one Paul Garrett large sums of money, and him, the said Paul Garrett, to cheat and defraud out of his moneys, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

"Your petitioners further aver that upon the filing of said indictmen- in said court, no capias or warrant of said court issued, calling for the arrest of your petitioners, nor were your petitioners arrested and taken into custody by virtue of or in consequence of any warrant or capias issued by said superior court of North Carolina, but that your petitioners were unlawfully seized and taken before said superior court without warrant and thus required to answer said indictment so returned against them, on, to wit, June 5, 1901.

"Your petitioners further aver that said indictment so returned

against them in said court charges a conspiracy to cheat and defraud, which was not and is not an offense under the statutes and code of North Carolina; and that no such offense as charged was known to the common law of England prior to the Declaration of Independence, July 4, 1776, which said common law the said State of North Carolina adopted as a part of the law of said State, and that no such offense is known to the common law of North Carolina as adopted from England and as interpreted by the courts of said State.

"Your petitioners further aver that such of the law of England as related to conspiracy and which was adopted by the State of North Carolina was by the act of its legislature in the years 1835-'36 repealed, and that the legislature of this State has since then substituted therefor nothing touching the offense described in the indictment so found and returned against your petitioners.

"Your petitioners further aver that the criminal code of North Carolina assumes to cover all criminal offenses and to exclude all acts other than those described by its term as being criminal; and, under the terms of said code, no such crime as described and set forth in said indictment as justifiable or punishable by the courts of said State; and that such indictment charges no offense known to the law, statutory or other, of said State.

"Your petitioners further aver that at the June term of said court, 1901, said case was called for trial, and that then and thereupon, and before entering their plea of 'not guilty,' your petitioners moved to quash the said indictment on the grounds that said indictment, their apprehension and production before said court as aforesaid, was not due process of law; that in and by said indictment and their arrest as aforesaid your petitioners were denied the equal protection of the laws of said State of North Carolina, and that thereby the privileges and immunities of your petitioners as citizens of the United States were abridged, but which said motion of your petitioners the said superior court overruled and denied.

"That thereupon your petitioners at once moved the court to require the solicitor of the State to furnish them a bill of particulars of said indictment, which said motion was denied, and thereupon your petitioners were arraigned and pleaded 'not guilty' to said indictment, and their trial thereupon at once proceeded before said court, and men to the number of twelve, selected and drawn as petit jurors to serve in said court at said term in the manner contrary to and forbidden by the statute laws of the State as aforesaid—they, the said twelve men, being of the number of jurors so selected and drawn as aforesaid—the said court empaneled and swore as a petit jury in said cause, and before whom and said court your petitioners were forced to trial.

"That at the conclusion of the testimony offered by the State, your petitioners moved the court to be discharged, but which, their said motion, was by the court denied.

"That thereupon the said court gave its written charge to said jury in said cause, and therein and thereby violated the said fourteenth amendment to the Constitution of the United States, in this:

that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal cases were then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to such jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked such a hypothesis in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions; though said instructions so prayed embodied a state of fact which the evidence adduced tended to prove. That in violation of said section 413 in its charge the trial court singled out the prosecuting witness, Garrett and distinctly commended him and his acts to said jury.

"That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his said charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the Supreme Court.

Whereupon said jury found your petitioners guilty.

"That thereupon your petitioners moved the court in arrest and judgment, setting out as grounds for said motion, among others, that said indictment, arrest, trial and conviction of your petitioners was in violation of the fourteenth amendment to the Constitution of the United States, in that it abridged the privileges and immunities as citizens of the United States, they being citizens thereof; that it was not due process of law and that it denied petitioners the equal protection of the laws of North Carolina and as guaranteed by said fourteenth amendment, which motion was thereupon overruled; and the court sentenced your petitioners to terms in the penitentiary of North Carolina, as follows: Howard and Hawley for ten years, and Daley for seven years.

"That thereupon your petitioners objected and excepted to said sentence as being cruel and unusual and in violation of article 1, section 14, of the constitution of North Carolina, and of article 8 of the Constitution of the United States, and the said fourteenth amendment to the Constitution of the United States.

"That thereupon said superior court allowed your petitioners an appeal to the supreme court of North Carolina and fixed the bail of your petitioners, Howard and Hawley at $5,000 each, and Daly at $3,000; to which amounts petitioners objected as being excessive and in violation of said fourteenth amendment, which said objection said court overruled and petitioners excepted.

"That thereupon your petitioners were taken by the sheriff of Guilford county to and confined in the county jail thereof.

"Your petitioners further aver that pursuant to their appeal prayed and allowed as aforesaid, said cause came on to be heard in

the supreme court of said State to the August term thereof, 1901, and was there duly argued on behalf of the State and all of your petitioners, and wherein your petitioners presented and urged each and every of the points herein above mentioned and the violation of the constitutional provisions as above specified, and that said cause so submitted was by said supreme court taken under advisement; and that on December 3, 1901, the members of said supreme court filed their several and separate opinions in said cause, two of which were dissenting and for reversal of said judgment on the ground of the numerous errors as shown in said record and presented and urged in the argument of said case before them, and that a third separate opinion filed declared in favor of your petitioners on two points of error as presented in said record and argument, but still concurred in favor of affirmants of said judgment against your petitioners; but that the majority opinion of said supreme court filed in said cause wholly failed to pass upon the said objections and constitutional questions raised by your petitioners as aforesaid, as by said record and opinions, to which reference is here had, will more fully and particularly appear; and thereby said supreme court, in so affirming said judgment, denied your petitioners the equal protection of the laws of the State of North Carolina and abridged their rights and privileges and immunities as citizens of the United States, and that the same was not due process of law within the meaning of the fourteenth amendment of the Constitution of the United States.

"Your petitioners further aver that the said indictment, arrest, imprisonment, conviction, sentence and judgment in the superior court of Guilford county, and the affirmance by the supreme court of the State of North Carolina of said judgment of said Guilford county superior court were and are void, because the said indictment so illegally found and returned was not due process of law, that there was not charged in said indictment any offense known to the law, statutory or other, of said State, or justiciable or punishable by the courts of said State; and that in consequence the superior court of Guilford county was without jurisdiction of the subject-matter of said indictment or power or right or jurisdiction to adjudge the same an offense against your petitioners, or them guilty thereunder, or to impose any fine or penalty against your petitioners for or under said indictment, and said supreme court of North Carolina was without jurisdiction to affirm said sentence.

"Your petitioners further aver that the judgment of said Guilford court imposed a penalty on your petitioners greater than was ever imposed for the same or similar offense by any court in the State of North Carolina, and that the same is different in kind and servitude and in punishment ever imposed by any court in said State for like or similar offense, and that said judgment so affirmed by said supreme court is *ex post facto* and void under the Constitution of the United States, and that said supreme court is the highest court in the State to which your petitioners might or could appeal, and that they have exhausted their remedies therein.

"Your petitioners, therefore, aver that said proceedings and each

of them were and are and each of them was and is in violation of the 14th amendment to the Constitution of the United States, and that thereby and in the result thereof the rights of your petitioners as citizens of the United States have been abridged; that they have been denied the equal protection of the laws of North Carolina, and that they have been deprived of their liberty and property without due process of law, and that there has been imposed and inflicted and still is being imposed and inflicted a cruel and unusual punishment in this that on the 18th day of December, 1901, your petitioners, without the valid order or judgment of any court of the State of North Carolina, were by force taken to and imprisoned in the penitentiary of said State, at the city of Raleigh, in the county of Wake, where they now are in the custody and detained by Capt. J. M. Fleming, the warden of said penitentiary, under the pretended authority of a mittimus or warrant of commitment, issued as aforesaid; and copy of which is hereto annexed as aforesaid; and that they are so wrongfully, unjustly, forcibly and unlawfully detained against their right and constitutional privileges aforesaid and without legal warrant therefor.

"Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioners pray that a writ of *habeas corpus*, to be directed to the said Capt. J. M. Fleming, may issue in this behalf, so that your petitioners may be forthwith brought before this honorable court, that the cause of their said unlawful restraint, detention and imprisonment, as aforesaid, may be inquired into, and your petitioners to receive what the law may require, etc."

3 Ex. "A."

STATE OF NORTH CAROLINA,
Guilford County.

Superior Court, June Term, 1901.

Be it remembered that at a regular term of the superior court, begun and held for the county of Guilford at the court-house in Greensboro on the 3rd day of June, 1901, the following persons were convicted and sentenced to the State penitentiary.

STATE
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY.

Indictment, conspiracy, guilty.

Judgment of the court that the defendant J. L. Howard, alias Frank Thompson, be imprisoned in the State penitentiary for a term of ten (10) years.

Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten (10) years.

Judgment of the court that the defendant A. L. Daly, alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven 7) years.

I, John J. Nelson, clerk of the superior court of said county, do hereby certify that the foregoing is a true copy of the judgment in the above-entitled cause as same appears upon the records in my office, and I further certify that the certificate from the supreme court of North Carolina was received in my office this day.

In witness my hand and official seal at office in Greensboro this the 12th day of December, 1901.

(Signed) JNO. J. NELSON,
[SEAL.] *Clerk Superior Court.*

[Endorsed:] Howard *et al.* Commitment.

4 And thereupon on to wit: the said 18th day of December, 1901, the said Thos. R. Purnell, presiding as judge of said circuit court of the United States for the eastern district of North Carolina, upon the reading and filing with the clerk of said court the said petition granted thereon in said cause the following order, that is to say.

Order for Writ of Habeas Corpus.

"In the Circuit Court of the United States for the Eastern District of North Carolina.

"In the Matter of the Petition of J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY for Writ of *Habeas Corpus.*

"On reading and filing the petition of J. L. Howard, A. L. Daly and H. D. Hawley, duly signed and verified by them, whereby it appears that they are illegally imprisoned and restrained of their liberty by Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, at the city of Raleigh, in the county of Wake, in said State, and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue. It is ordered that a writ of *habeas corpus* issue out of and under the seal of the circuit court of the United States for the eastern district of North Carolina, sitting at the city of Raleigh, in said State, directed to the said Capt. J. M. Fleming, commanding him to have the bodies of the said J. L. Howard, A. L. Daly, and H. D. Hawley before me in the court-room of the said court, situated on the third floor of the Government post-office building in the city of Raleigh, on the 28th day of December, 1901, to do and receive what shall then and there be considered concerning the said J. L. Howard, A. L. Daly and H. D. Hawley, together with the time and cause of their detention, and that he have then and there the said writ.

"Dated at the city of Raleigh on the 18th day of December, A. D. 1901.

"THOS. R. PURNELL,
"*United States Circuit Judge.*"

5 And thereupon on to wit: December 19th, 1901, the clerk of the said circuit court of the said United States for the east-

ern district of North Carolina issued the writ of *habeas cor-us* in said cause under his hand and the seal of said court to Capt. J. M. Fleming, warden of the pen-tentiary of North Carolina, at Raleigh, and which said writ so issued is in the words and figures as follows, that is to say:

6 *Writ of Habeas Corpus.*

In the Circuit Court of the United States for the Eastern District of North Carolina.

In the Matter of the Petition of J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY, in the United States Circuit Court for the Eastern District of North Carolina, Sitting at the City of Raleigh, in said State, for Writ of *Habeas Corpus.*

The President of the United States of America to Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, Greeting:

We command you that the bodies of J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, by you detained, and in person it is said, you have before our court at the city of Raleigh and in the rooms usually occupied by it as a court-room, on the third floor of the Government post-office building in said city, on the 28th day of December, A. D. 1901, at 10 o'clock a. m., together with the cause of the detention of the said J. L. Howard, A. L. Daly, and H. D. Hawley, to undergo and receive what our said court shall consider concerning them in this behalf; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, this 19th day of December, 1901, and in the 126th year of the Independance of the United States.

To the marshall of the eastern district of North Carolina to execute.

[OFFICIAL SEAL.] N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

[Endorsed:] Howard *et al.* *Habeas corpus* writ.

7 And thereupon said writ of *habeas corpus* issued as aforesaid directed to the marshal of said circuit court of the United States for the eastern district of North Carolina for service upon the said J. M. Fleming, warden of said pen-tentiary at Raleigh, was by the clerk of said court delivered to said marshal on the 19th day of December, 1901, together with a copy of the petition so filed in said cause and which said writ so executed and delivered with said copy of said petition said marshal on said 19th day of December, 1901, duly made service of on said Capt. J. M. Fleming, warden of said

pen-tentiary, and made return of due service thereof as appears on said writ, in the words following to wit:

8 Received December 19th, 1901, the within writ and executed the same by reading the same to Capt. J. M. Fleming and by leaving with him certified copy thereof together with a copy of the petition for the writ of *habeas corpus* at his office in the pen-tentiary of the State of North Carolina at the city of Raleigh therein. This 19th of December, 1901.

H. C. DOCKERY,
U. S. Marshal,
By J. T. SHARP, *D. M.*

9 And be it further remembered that on the 28th day of December, 1901, the said Capt. J. M. Fleming, warden of the pen-tentiary of North Carolina made his return to said writ so granted, issued and served as aforesaid into said court, producing therewith into said court the bodies of the petitioners aforesaid and which said return so made and filed with the clerk of said court by said respondent together with the exhibits thereto annexed is in words and figures following, to wit:

10 Circuit Court of the United States, Eastern District of North Carolina, at Raleigh.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ Bono, and H. D. Hawley, Petitioners,
vs.
J. M. FLEMING, Warden of State's Prison of North Carolina.

To the Honorable M. W. Fuller, Chief Justice of the United States, and the other justices of the above-entitled court, and to Hon. Thomas R. Purnell, United States district judge for the eastern district of North Carolina, sitting as circuit judge:

J. M. Fleming for his return to the writ of *habeas corpus* issued in the above-entitled cause by the Hon. Thomas R. Purnell, United States district judge, on December 18th, 1901, says:

That he admits that as warden of the State's prison of North Carolina he has in his custody the petitioners J. L. Howard, A. L. Daly and H. D. Hawley, and that they are detained in his custody as such warden by virtue of a mittimus or warrant of commitment issued by John J. Nelson, clerk of the superior court of Guilford county and, as your respondent is informed and believes, under the following circumstances: That on or about March 23rd, 1901, the defendants were duly arrested by one J. F. Jordan the sheriff of the county of Guilford, North Carolina, under and by virtue of a warrant duly issued by A. P. Eckle, an officer of the State of North Carolina, duly authorized to issue the same, charging petitioners with an offence against the criminal laws of the State of North Carolina, as will more
11 fully appear by reference to a copy of the said warrant which is attached to this return and is asked to be made a part thereof.

That respondent is informed and believes that on or about the 23rd day of March, 1901 the petitioners were duly brought before the said J. M. Wolfe, they having upon affidavit secured the removal of the cause from the said A. P. Eckle to the said J. M. Wolfe, who possessed the power of a committing justice under the laws of the State of North Carolina and could legally pass upon and hear the said warrant and hold the petitioners for the action of the grand jury of the superior court of the said county of Guilford, in said State. That after a due and regular hearing the said J. M. Wolfe, so acting in his official capacity had adjudged that there was probable cause of the guilt of the petitioners of the offence charged against them in the said warrant and thereupon further adjudged that the petitioners severally enter into bonds in the sum of three thousand dollars for their several personal appearances at the superior court of the said county of Guilford and State aforesaid, to be holden on June 3rd, 1901, and in default thereof that they be committed to the common jail of the said Guilford county, and issued a mittimus to the sheriff of Guilford county a certified copy of which is herewith filed.

That respondent is informed and believes that the petitioners failed to give their said several bonds for their said personal appearances at said term of court and were duly committed to the common jail of Guilford county to await the action of the said court.

That at said term of the superior court of Guilford county, the grand jury duly passed upon, found and returned as "a true bill" a bill of indictment in words and figures as follows, to wit:

STATE OF NORTH CAROLINA, }
Guilford County. }

Superior Court, June Term, A. D. 1901.

"The jurors for the State, upon their oath present, that
12 J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devices, to obtain from one Paul Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

"Second count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, being persons of

fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make assault and him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley had been mutually agreed and undertaken to
13 do; to the evil example of all good citizens and against the peace and dignity of the State.

Third count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property, did on the 20th day of March, A. D. 1901, in the county of Guilford, aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit: by him, the said J. L. Howard, alias Frank Thompson, pursuant to a conspiracy, confederation and agreement theretofore had and made between him and his co-conspirators above named, falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson, and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona, which said gold was held by the said Gonez Bono on Buffalo creek, near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him; when the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine, and of the value of many thousands of dollars which they offered to demonstrate by a chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's
14 outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of their common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley. And the said J. L. Howard, alias Frank Thompson, then and there sought to dispose

of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal fals-ly and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal, by means of which said false, fraudulent and felonious representations, the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided, and against the peace and dignity of the State.

(Signed) "BROOKS, *Solicitor.*"

This indictment was regularly endorsed and returned "A true bill" by the foreman of the grand jury.

That upon the finding of the said bill of indictment by the said grand jury of the superior court of said county of Guilford the petitioners were directed by the judge of the said court therein presiding, to wit: Hon. W. B. Council, to be brought from the said common jail of said county to the bar of the said superior court of said county, then in regular session, due answer to make to the said bill of indictment. That thereupon the proceedings were had, which are set forth in full in the printed record of the defendant's statement of ca-es on appeal to the supreme court of North Carolina which is filed herewith, and which in all its parts is signed by the attorneys of record of the said petitioners herein and defendants therein, and which is asked to be taken as a part of this return in as full and ample a manner as if herein set forth word for word; and that your respondent is informed and believes that the proceedings therein and thereupon had in said court so sitting, in said action wherein The State of North Carolina was plaintiff and the petitioners herein were defendants, were in all respects regular and according to the due and orderly course and practice of the said court, under the constitution and laws of the State of North Carolina.

That replying to so much of petitioners' application for a writ of *habeas corpus* as states that the grand jurors and certain of the petit jurors at said term of said court were not drawn by the commissioners of the county of Guilford in the manner required by the statute laws of the State of North Carolina, your respondent states that he is advised and believes that the jurors from which the grand jury for said term of said court was selected, were drawn, chosen and selected in the way and manner in which the commissioners of said county of Guilford have done for many years; and that if petitioners are entitled to their release from imprisonment by reason of such irregularity in drawing the jurors then all the prisoners serving sentence under any judgment upon a verdict on a bill of indictment found in said county for many years are entitled to a release and discharge from their said imprisonments.

Further answering the respondent says that under the laws of the State of North Carolina and under the course and practice of its courts, the irregularities complained of, even if true, can be taken advantage of only before plea to a bill of indictment found by such

grand jury; that the petitioners herein and defendants therein
16 made no motion to quash the indictment and filed no plea in abatement and did nothing to legally take advantage of and claim any benefit or privilege growing out — said irregular manner of drawing said jurors. That it is true that the petitioners did in apt time move to quash the bill of indictment found against them but that the grounds upon which they based their said motion are fully set forth in the said "Case on appeal," and it is not true that they moved to quash the said bill of indictment for *nay* any irregularities or illegalities in the drawing or constitution of the grand jury which found said bill of indictment, or of the petit jury which tried the petitioners and which found them severally guilty of the offense charge- in the said bill of indictment. That when called upon to plead to the said bill of indictment so found by the grand jury as hereinbefore set out the defendants therein and petitioners herein entered their plea of "Not guilty" without having raised any objection to the manner in which the jurors were drawn by the county commissioners of said Guilford county, and that thereby, as this respondent is advised they waived any objection to the said grand jury and to the said petit jury, and to the manner in which said jurors were drawn and chosen.

Further answering the same the respondent says that he is advised that the alleged defect, or irregularity or illegality in the manner of drawing said jurors and in selecting and cho-sing them cannot be taken advantage of in this proceeding, and cannot avail the petitioners herein.

That affiant avers that upon the trial upon the indictment hereinbefore set out the petitioners were duly convicted upon the first count thereof, and found by the said jury so selected, sworn and empanelled without objection on the part of the petitioners to have been guilty as charged therein; that the petitioners then appealed to the supreme court of the State of North Carolina, and filed
17 therein a full and complete statement of the proceedings of said court as the record of said trial, and known as "Defendant's case on appeal," which was duly accepted by the solicitor prosecuting in said court on behalf of the State of North Carolina, a copy of which said case on appeal is filed as an exhibit herein, and that the petitioners took no exception, and made no objection to the proceedings, acts and doings of said court except such as are so set forth in the said case on appeal.

That after full argument and mature deliberation the supreme court of the State of North Carolina affirmed the judgment of the said superior court of the county of Guilford, holding and deciding that the bill of indictment did charge a criminal offence cognizable under the laws of the State of North Carolina and that the petitioners were duly and properly found guilty as charged therein. That a copy of the opinion of the supreme court of North Carolina so rendered by it and a copy of the judgment of said supreme court of North Carolina therein are filed herewith as exhibits and asked to be taken as a part of this return and answer.

That the chief justice of the supreme court of North Carolina

filed a dissenting opinion, expressing an opinion that the court below had erred in expressing an opinion on the weight of the evidence, and that for that reason there should be a new trial Reference is made to a copy of said opinion herewith filed.

That one other justice of the supreme court of North Carolina dissented from the opinion of the court, but in doing so he states that he is satisfied of the guilt of the petitioners of the offense charged, but thinks there should be a new trial for the error committed by the court below which he points out in his dissenting opinion.

That thereupon John J. Nelson, clerk of the superior court of said county of Guilford, as was his duty issued his mittimus
18 and committment in words and figures as shown by the copy attached to petitioners' application for a writ of *habeas corpus*, upon which petitioners are now held in custody by your respondent as warden of the State's prison of North Carolina.

Your respondent further avers, on information and belief, that the petitioners heretofore applied for writs of *habeas corpus* to two of the judges of the State of North Carolina, including Hon. D. M. Furches, chief justice of the supreme court of the State of North Carolina, who filed a dissenting opinion in the cause on its merits, declaring that the petitioners were entitled to a new trial, because of the expression of opinion by the judge who presided at the trial of the petitioners, and that said chief justice on the hearing of said writ of *habeas corpus* declared and determined that under the laws of North Carolina the bail required of the defendants was reasonable, just and legal and refused to alter or change the same, as did two superior court judges, who passed upon the same question.

That respondent is advised and so pleads that this court is without jurisdiction to hear and pass upon the several alleged errors, irregularities and illegalities set forth in the application of the petitioners, for that they severally arise under the constitution and the laws of the State of North Carolina and do not come within the purview of section 753 Revised Statutes *under which* of the United States, under which act this court derives its jurisdiction in the premises, in that the petitioners are not in custody in violation of the Constitution or of a law or treaty of the United States.

That respondent is advised and so pleads that the petitioners are not entitled to their discharge from the custody of respondent upon the facts stated in the application of the petitioners for that their remedy, if any they have, is by a writ of error to the Supreme Court of the United States and not by a writ of *habeas corpus*.

That respondent is advised and so pleads that the petition-
19 ers are lawfully in his custody as a just and legal punishment for their several heinous and aggravated crimes and felonies.

Your respondent further avers that the punishment imposed upon the petitioners is not unusual and is, as he is advised, fully authorized by the laws of the State of North Carolina. That upon the hearing before the Hon. W. B. Councill, the judge presiding, and who sentenced the said petitioners it appeared from facts that were before the said court, that two of the petitioners, to wit: A. L. Daly

and J. L. Howard, were charged and under indictment in that court for carrying concealed weapons, to wit: pistols which each of them attempted to use by assaulting the arresting officers, with intent to kill them; and it appeared to the court that warrants were out in the State of South Carolina against the petitioners, charging them with an offense of criminally conspiring together to cheat and defraud of like nature and character as the offense of which they had been convicted in this State, and that a requisition had been issued by the governor of the State of South Carolina upon the governor of North Carolina for the petitioners and was by him held up, to await the result of the trial in this State and is now held in the hands of the governor of this State.

That it further appeared that a requisition from the governor of the State of Iowa had also been issued to the governor of the State of North Carolina that the body of one of the petitioners herein, J. L. Howard, be held to answer an indictment pending in the said State against him for a like offense of criminally conspiring to defraud in the manner as charged and of which he had been convicted in this State.

That it further appeared to the court that a Mr. Wheeler, the prosecuting witness in the case from South Carolina had been to Greensboro and visited the jail in which the petitioners were confined and recognized and identified the said J. L. Howard and H. D. Hawley as the parties who had perpetrated the gold-brick scheme upon him and had fraudulently secured from him the sum of $7000.

That this matter has been expressly passed upon by the supreme court of North Carolina and has been decided adversely to the petitioners and is not a matter as respondent avers that arises under the Federal Constitution, but only in the administration of the criminal laws of the State of North Carolina.

Wherefore the respondent prays the court that the petitioners, J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono and H. D. Hawley be recommitted to the custody of the respondent as warden of the State's prison of North Carolina, to be held by him in accordance with the judgment of the superior court of Guilford county, N. C., and of the supreme court of North Carolina, and that the respondent do recover of the petitioners his costs and expenses in this behalf expended.

And further your respondent will ever pray.

THOMAS B. WOMACK,
A. L. BROOKS,
Attorney for Respondent.

NORTH CAROLINA, }
Wake County. }

J. M. Fleming being sworn deposes and says that the foregoing return and answer is true to his own knowledge except as to those matters stated on information and belief and that as to those he believes it to be true.

JAS. M. FLEMING, *Warden.*

Subscribed and sworn to before me Dec. 23, 1901.

R. R. BOYD,

[NOTARIAL SEAL.] *Notary Public.*

21 N. C. Supreme Court, August Term, 1901. #289. Guilford.

The Gold Brick Case.

Bynum & Bynum, F. P. Blair and L. A. Gilmore for appellants; Attorney General Gilmer for the State.

CLARK, *J.:*

The defendants, J. L. Howard, alias Thompson, Gonez Bono, alias A. L. Daley and H. D. Hawley, *and* indicted for a conspiracy to defraud. The indictment was in three counts. At the close of the evidence for the State, the defendants moved the court to require an election by the State upon which count it would rely for conviction. Thereupon the solicitor elected to rely upon the first count, and entered a "nolle prosequi as to the second and third counts—these other counts to be referred to as furnishing particulars." Upon this being done, the defendants asked the court to instruct the jury to return a verdict of not guilty, and excepted to the refusal. The defendants introduced no evidence.

The three counts were simply a description of the same transaction in different ways, and the joinder was unobjectionable. The court need not therefore have required an election. State *vs.* Barber, 113 N. C. at p. 714, citing State *vs.* Morrison, 85 N. C., 561; State *vs.* Allen, 107 N. C., 805; State *vs.* Harris, 106 N. C., 682; State *vs.* Parrish, 104 N. C., 679; State *vs.* Horan, 61 N. C., 571, 576.

The evidence is uncontradicted, and its chief features will be set out by the reporter in the statement of the case. It is almost dramatic in its details, and presents with striking clearness the methods of a fashion of swindling, which has doubtless been little practiced in this State. The indictment in full will also be copied by the reporter.

The first exception is that the indictment did not set out the means by which the conspiracy was to be executed. The point is expressly decided in State *vs.* Brady, 107 N. C. 822, where it is held, upon our own authorities, that a conspiracy to cheat and defraud need not charge the means to be used. Such was also the common law, as will be seen by reference to the English cases therein cited—also citing Commonwealth *vs.* McKisson, 8 S. & R., (Pa.) 419; 8

22 Greenleaf Ev., sec. 95, and while stating that some States had held differently, this court decided to abide by our own and the English rule. The learned counsel from Illinois, who ably argued this exception for the defendants, admitted this but at great length endeavor-*der* to persuade — to overrule our own decisions, contending that the weight of authority in this country was to the contrary. We think not, but if it were, that alone would not be sufficient to induce us to change, unless injustice was shown to follow from our decisions. In fact, however, the weight of authority in other States

seems to uphold our ruling. Among many cases to like effect are State *vs.* Noyes, 25 Vt. 415, State *vs.* Barlett, 30 No. — State *vs.* Crowley, 41 Wis. 271; Thomas *vs.* People, 115 Ill. 351; State *vs.* Stewart, 59 Vt. 273; State *vs.* Grant, 86 Iowa 216; People *vs.* Clark, 10 Mich. 310; 2 Bish. New Crim. Proc. sec. 207 (2).

The Code of Civil Procedure sec. 259 provides: "The court may in all cases order a bill of particulars of the claim of either party to be furnished." This transferred to civil cases what was already the practice in criminal actions. In this case these particulars were fully furnished by the second and third counts, which were only nol-prossed at the instance of the defendants and after the close of the evidence, so that they were in full possession of all the information which a bill of particulars could have furnished them.

The next exception was for refusal of the motion to quash: "For that the allegations in the said bill of indictment, and in each and every count thereof, do not constitute a crime under the ordinance of conspirators, made and accorded by King Edward the First and his council in the thirty-third year of his reign, A. D. 1305, nor by any statutes in England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense."

With reference to the statute 33 Edward, *de conspiratoribus*, Judge Council charged the jury as follows:

"Its existence can be traced back centuries prior to our Independence, and such eminent ancient law-writers as Coke, Hawkins and others, refer in their works to the existence of this crime prior to the passage of the statute 33 Edward 1 *de conspiratoribus*, which statute has been commented upon by counsel for the defendants. Law-
23 writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."

The cases sustaining his honor's view of the law of conspiracy are numerous. Among them

State *vs.* Buchanan, 5 Harris and Johnson (Maryland), page 317, is an elaborate discussion of the question, covering fifty pages, and many authorities are cited. In this case, at page 333, the court says: "Much reliance is placed on the statute of Edward 1st *de conspir-torabus* on the supposition that the offense of conspiracy was originally created by that statute." The learned judge then proceeds to show, pages 333–351, that the offense of conspiracy existed prior to the passage of 33 Edward passed in 1304, and on page 351 observes; "By a course of decisions running through a space of more than four hundred years from the reign of Edward 1 to the 59th of George III without a single conflicting adjudication, these points are clearly settled:

"1st. That the offense of conspiracy is of common-law origin, and not restricted or abridged by the statute 33 Edward 1.

"2d. That a conspiracy to do any act that is criminal *per se*, is

an indictable offense at common law, for which it can scarcely be necessary to offer any authority."

In State *v.* Burnham, 15 New Hamp., 396, Gilchrist, J., speaking for the court, says: "In the first place we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury, and as deserving reprehension under one form of government as another."

To the same effect are Commonwealth *v.* Hunt, 45 Mass. 111. State *v.* Pulle, 12 Minn., 164.

In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers, and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offiense, and therefore this court had no jurisdiction thereof. The supreme court held on appeal that conspiracy not declared a crime by the statute law was punishable because of the common law."

In United States *v.* McCord, 72 Fed. Rep., 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offence. They merely recognize the crime of conspiracy as known to the common law and the courts must go to the common law to determine what it is."

In 2 Bishop's New Criminal Law, section 174, the statute of 33 Edward 1 is quoted in full, and the author adds, in subsec. 2, the following:

"Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before."

In State *vs.* Younger, 12 N. C. 357, this court held that "a combination of two or more to do any unlawful act, or *one prejudicial to another*, is indictable at common law as a conspiracy." State *vs.* Brady, 107 N. C. 822; State *vs.* Powell, 121 N. C. 635; State *vs.* Wilson, 121 N. C. 650.

The cases already cited dispose of the other exceptions for refusal to quash. Some of the authorities cited by defendants are no longer authorities, since the Code of 1888 added to section 1025 the second *proviso* thereof, that in indictments for false pretence "it shall be sufficient in any indictment for obtaining or *attempting to obtain* any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act with intent to defraud."

The third exception is as follows: "While the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury

was being selected and empaneled and during the trial of
25 said cause. The solicitor objecting said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked that it was a matter of discretion with the court and that all the witnesses, except the complaining witness Gar-ett and the high sheriff of the county, might be excluded from the court; but as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other." It would indeed be sufficient to say that it does not appear that any one of the jurors, who actually sat on the trial, heard the remark; but we prefer to put our ruling upon broader ground. By the common law, judges were not prohibited from expressing an opinion upon the facts, and this is still true of the Federal courts and all the States in which there is no statute making a change in this respect. In North Carolina, the only change is that made by the act of 1796, now code section 413, which reads as follows: "No judge *in giving a charge to the petit jury*, either in a civil or a criminal action, shall give an opinion whether a *fact is fully or sufficiently proven*." This is the extent of the statutory change. It goes no further. In State *vs.* Angel, 29 N. C. 27, Ruffin, C. J. says; "The 'facts' on which the act (1796) restrains him (the judge) from expressing an opinion to the jury are those respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendants depends." In State *vs.* Laxton, 78 N. C. 564, Smith, C. J. says; "It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion *in connection with and constituting a part of the instructions* by which the jury were to be governed, and when its influence on their minds would be direct and effective." To same purport in De Berry *vs.* Railroad, 100 N. *N.* 310; State *vs.* Robertson, 86 N. C. 628; State *vs.* Jones, 67 N. C. 285. These were cases in which the remarks were made by the judge during the progress of the trial, but it is not necessary that we pass upon the question whether the remark here made by the judge would be ground for setting aside the verdict if made during the progress of the trial, for it was not
26 made at such time. At the time when made, no juror had been selected, and the remark was not "to the jury," nor did it contain any opinion that "a fact was fully or sufficiently proven." No fact had been shown in evidence. The remark was not prohibited at common law and is certainly not prohibited by any terms in the statute. No decision of our court has ever hinted that a statute forbidding the judge "in a charge to the petit jury" from "expressing an opinion whether a fact is fully or sufficiently proven," extended to the remarks of a judge complimentary to one (who was afterwards examined as a witness) made before the jury was selected or empaneled. In every case where such proposition has been presented, this court has denied the application of the statute. State *vs.* Jacobs, 106 N. C. 695; S. C. 107 N. C. 774; State *vs.* Jackson, 113 N. C. 853.

The defendants except to the sentence imposed of imprisonment in the penitentiary but concede that this court has ruled otherwise in State *v.* Mallet 125 N. C. 718 which we reaffirm.

The other exceptions were without merit and were not seriously pressed in this court.

Affirmed.

27 STATE *vs.* HOWARD. # 289. Guilford.

FURCHES, *C. J.*, dissenting:

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses and in what he said near the close of his charge to the jury, that Gar-ett's conduct was not a proper subject for unfriendly comment.

MONTGOMERY, J. concurs in the conclusion reached by the court. He thinks, however, that what his honor said on the trial below in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendant's counsel on the witness'es testimony was inappropriate and indiscreet. The language of the statute on the subject may not have been violated but its spirit certainly was.

28 To the keeper of the common jail of Guilford county:

You are hereby commanded to receive the bodies of A. L. Daley, alias Gonez Bono, J. L. Howard alias Frank Thompson, and H. D. Hawley, who are held to bail in the sum of three thousand dollars each for their appearance at the next term of the superior court of Guilford county.

This 23rd day of March 1901.

(Signed) J. M. WOLFE, *J. P.*

NORTH CAROLINA, *Guilford County.*

I. J. F. Jordan, sheriff of Guilford county, N. C., do hereby certify that there foregoing is an exact and true copy of the mittimus issued by J. M. Wolfe, J. P., to me in said case, and now on file in my office, by authority of which the parties therein named were by me held and produced in the superior court at the June term 1901 thereof, at which term the said defendants where convicted and sentenced.

J. F. JORDAN, *Sheriff.*

Sworn to and subscribed before me this the 20th day of December 1901.

JNO. J. NELSON,
C. S. C. of Guilford County.

[OFFICIAL SEAL.]

29 STATE OF NORTH CAROLINA:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Guilford County, Gilmer Township. Before A. P. Eckel, J. P.

H. A. Mimms, being first duly sworn, complains and says, that at and in said county and in Gilmer township on or about the 22nd day of March, A. D. 1901, one A. L. Daley, alias Gonez Bono, L. J. Howard, alias Frank Thompson and H. D. Hawley, late of the county of Guilford, being persons of evil minds and dispositions, and seeking to get their living by various subtile, fraudulent and dishonest practices, on the 22nd day of March, 1901, and on divers other days prior thereto in secrecy with deceit and intent to defraud, with force and arms at and in the county aforesaid, among themselves together with divers other evil-disposed persons, unlawfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtile means and devices to obtain from one Paul Garrett divers large sums of money of the said Paul Garrett and to cheat and defraud him by means of said false pretenses and subtile deceits, and against the peace and dignity of the State.

Second count. Affiant further says that A. L. Daley, alias Gonez Bono, J. L. Howard, alias Frank Thompson and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions, and wickedly devising and intending to cheat and defraud the said Paul Garrett of his moneys, goods, chattels and property, did on the 22nd day of March, A. D. 1901, in the county of Guilford aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of h*id* moneys, goods chattels and property as
30 aforesaid, in the false and deceitful color and pretenses of the said J. L. Howard, alias Frank Thompson, to wit, by his *and* the said Frank Thompson and his associate and confederate, Gonez Bono, alias A. L. Daley, — were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona and in pursuance and according to said conspiracy, did on the said date in the county of Guilford, wickedly, fraudulently and falsely exhibit and show to the said Paul Garrett large blocks of metal in possession and control of said Gonez Bono, alias A. L. Daley, one of the co-conspirators of the said L. J. Howard, alias Frank Thompson, pretending *that* the said blocks of metal then and there to be solid blocks of gold, 22 karats fine and of the value of many thousands of dollars which they rep-

resented that they would then and there demonstrate by a chemical analysis to be then and there made by said co-conspirator, H. D. Hawley, who was then and there aiding and abetting his co-conspirators in their execution of their common, fraudulent and felonious designs to cheat and defraud all in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, the said A. L. Daley, alias Gonez Bono, and the said H. D. Hawley and the said J. L. Howard, alias Frank Thompson then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas, in truth and fact the said metal blocks falsely and fraudulently represented to be gold, were not gold, but of a cheap and comparatively worthless metal, by means of which said false and fraudulent and felonious representations the said J. L. Howard alias Frank Thompson, the said A. L. Daley, alias Gonez Bono and the said H. D. Hawley, in pursuance of their unlawful agreement and conspiracy, sought to obtain unlawfully and unjustly large sums of money from the said Paul Garrett.

31 Third count. Affiant says further that the said J. L. Howard, alias Frank Thompson, and the said A. L. Daley, alias Gonez Bono, and the said H. D. Hawley, being persons of evil minds and dispositions and not having the fear of God before their eyes and being moved and seduced by the instigation of the devil, on the 22nd day of March, 1901, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together in and upon Paul Garrett, in the peace of God and in the State, then and there being feloniously to make an assault, and him, the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put and the goods and chattels, moneys and property of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said L. J. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley had been mutually agreed and undertaken to do, to the evil example of all good citizens and ag-*sint* the peace and dignity of the State.

H. A. MIMMS, *Affiant.*

Subscribed and sworn to before me this the 23rd day of March, A. D. 1901.

A. P. ECKEL, *J. P.*

NORTH CAROLINA, }
Guilford County, Gilmer Township. }

State of North Carolina to any constable or other lawful officer of Guilford county, Greeting:

You are forthwith commanded to arrest A. L. Daley, alias Gonez Bono, J. L. Howard, alias Frank Thompson, and H. D. Hawley and them safely keep so that you have them before me at my office

32 in Greensboro, immediately to answer the above complaint and be dealt with as the law directs.

Given under my hand and seal this the 23rd day of March, 1901.

A. P. ECKEL, *J. P.*

The warrants against the defendants above named upon affidavits were transferred to me by A. P. Eckel, J. P. I proceeded to investigate the charges against the said defendants and after hearing the evidence and argument of counsel, I adjudged that there was probable cause of guilt, and held each one, viz: A. L. Daley, Frank Thompson and H. D. Hawley to bail in the sum of $3,000.00 for their appearance at the next term of the superior court for Guilford county, with good and sufficient security. The following witnesses were recognized in the sum of $50.00 each to appear at the next term of Guilford superior court, and not depart till discharged by the solicitor.

Paul Garrett—H. A. Mims—A. C. Patterson—J. F. Jordan—Garland Daniels—Baall Boone—Henry Whitfield—J. A. Weatherly—Marion Cobb—John Thompson.

J. M. WOLFE, *J. P.*

April 20th, 1901.

33 NORTH CAROLINA:

Supreme Court, August Term, 1901, Guilford County.

STATE
vs.
J. L. HOWARD, A. L. DALEY, and H. D. Hawley. } No. 289. Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark justice, be certified to the said superior court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this court incurred, to wit, the sum of forty-six $\frac{80}{100}$ dollars ($46.80), and let execution issue therefor.

I, Thomas S. Kenan clerk of said court do hereby certify the above to be a true copy of the opinion and judgment in the above-entitled cause. Dec. 9, 1901

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of the Supreme Court.

Furnished to Messrs. Gilmore & Blair, at their request.

K.

34 And thereupon to wit: on the 28th day of December, 1901, by leave of court first had the petitioners filed replication and

answer to said return of said respondent in the words and figures following to wit:

35 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of States Penitentiary of North Carolina.

To the Honorable Melville W. Fuller, Chief Justice, and the associate justices of the Supreme Court of the United States, and to Thomas R. Purnell, judge of the United States circuit court for the eastern district of North Carolina:

Your petitioners for replication to the return of J. M. Fleming, warden of the penitentiary of North Carolina, to the writ of *habeas corpus*, herein for the production before this honorable court of the bodies of your petitioners J. L. Howard, A. L. Daley and H. D. Hawley etc. say:

1. That they and each of them deny that they were arrested on warrant or process whatever issued by A. E. Eckle directed to J. F. Jordan, as sheriff of Guilford county North Carolina, or to any person or officer of said county; and deny that such justice or any other of said county issued such warrant or any warrant for the arrest of your petitioners at the complaint of one Paul Garrett or any one complaining of injury to him by your petitioners.

Your petitioners aver that they were seized without warrant or process and taken before one A. P. Eckle, at Greensboro and upon their motion were removed therefrom to the office of one J. N. Wolfe, a justice of the peace of the county of Guilford and were later taken from thence to the common jail of said county of

36 Guilford without bond allowed until on June 5th they were taken before W. B. Council presiding as judge of the superior court of Guilford county but without cap- or warrant by the said court directing said sheriff so to produce your petitioners.

Your petitioners answering further deny that the said supposed indictment returned into said superior court as and for a true bill against your petitioners was in fact a true bill or legal indictment and for the reason that the said supposed grand jury were not a legal body of grand jurors selected, summoned and empanneled according as the law provides, but that they were so selected summoned and empanneled as set forth in the petition of your petitioners for writ of *habeas corpus* and on file herein and to which reference is here had, and the same made part of this answer as though here again restated. That in the drawing selecting and empanneling of said number of men as a grand jury the State's agents and officers discriminated against and denied your petitioners the just and equal protection of the laws of the State of North Carolina in this that the law of the said State provides that in each county a jury-box shall be

kept with two divisions marked respectively No. 1 and No. 2, and that the county commissioners at stated intervals shall place therein the names of persons residing in said county eligible and qualified for jury duty, and that the juries for each term of court shall be drawn indiscriminately from box No. 1 and after service upon the jury at the term of court for which they were drawn the names of said persons shall be placed in box No. 2. That the jurors drawn for service at the term of court aforesaid by said county commissioners were not drawn indiscriminately from box No. 1 but were selected by the said commissioners from township boxes which the said commissioners had theretofore prepared, and that there was no general mixing of the names of all the persons eligible for jury duty, or was there any mixing at all of said names, but that said commissioners drew from certain township boxes certain names of persons who appeared before said court as grand and petit jurors; and whose incompetency and unfitness under the law for such service and duty as aforesaid are & were presumed to be known to A. L. Brooks, State solicitor of said county and district,
37 and to W. B. Council the judge presiding in and over said court, and to J. F. Jordan, sheriff of said Guilford county, all of whom were the agents and officers of the State of North Carolina and charged under their several oaths with the due and just administration of the laws of the State, and that each and every of said State's agents and officers in their several positions of duty as aforesaid by their conduct as aforesaid denied your petitioners the due and equal protection of the laws of the State of North Carolina in the respects aforesaid and that said pretended indictment by said pretended grand jury in said court was on that account a nullity and void. Your petitioners further answering say that upon the filing in said court of said indictment no process of any sort or kind issued by said court whereby to bring before it your petitioners to answer said indictment, but that your petitioners without process, or warrant were brought before said court and there informed of the contents of said supposed indictment, and that thereupon your petitioners filed a motion in writing to quash said indictment because the same was void in law, was not due process of law, did not charge any offense known to the law of said State, common, statutory or other, or sufficiently to inform and advise your petitioners as to what was intended to be charged against them, and otherwise insufficient and void as by their said written motion fully set forth in the printed record made part of respondent's return and which printed record is true and correct in every particular and to which reference is here made for a more full and particular account of your petitioners' said motion to quash said indictment and trial so had and for every other purpose pertinent to this investigation, but which their said motion the court overruled and denied, and thereby again as the agent and representative of the State of North Carolina did the said judge of said court deny your petitioners the due and equal and just protection of the laws of the State of North Carolina as guaranteed to them by the constitution of the State of North

Carolina and by the fourteenth amendment of the Constitution of the United States.

Your petitioners further aver that thereupon they moved
38 for a bill of particulars for the 1st, 2nd and 3rd counts of said indictment, setting forth in their said motion that said 1st count did not charge an offense under the law or set forth such facts and circumstances as to advise your petitioners what it was that was intended to be charged against them, or sufficient averment to apprise them of the nature and cause of the accusation against them or to enable them to prepare their defense thereto or to plead former conviction or acquittal or jeopardy thereunder to a second charge or indictment for the said same supposed offense, but which said motion the said court denied and therein and thereby your petitioners were by the agents and representatives of said State, charged with the administration of its laws, were denied the due and equal protection of the laws of said State under the constitution of said State and said fourteenth amendment.

Your petitioners further unswering say that thereupon they by and through their counsel entered their plea of not guiity to said indictment and each count thereof and that said court and said solicitor and said sheriff empanneled a number of men drawn and selected in the manner hereinabove set forth and contrary to the law of North Carolina as petit jurors, and therein and thereby the said court solicitor and sheriff as the agents and officers of the State of North Carolina charged with the enforcement of its laws denied to your petitioner the due and equal protection of the laws of said State in so empanneling said petit jury and forcing them to the jeopardy of their liberty before such illegal body.

Your petitioners further aver that the said supposed complaint, indictment or charge against your petitioners had to do with a certain contract between your petitioner J. L. Howard and A. L. Daley and one Paul Garrett, which contract in substance was that your said petitioners would pay said Paul Garrett $25.00 a day and his expenses to attend to certain affairs for them, and a third interest in what they had for his services to be rendered in that behalf; and that they had not proposed or in their minds purposed the obtaining from said Garrett any money or property whatever or to
39 accept from him any service except upon due compensation therefor; and yet such facts being before said court and said supposed petit jury adduced without more — said court upon the motion of your petitioners refused to discharge them from the complaint aforesaid, but in a written charge to said jury in substance told them that your petitioners were guilty of the charge made against them, denied them the law's presumption of innocence and commended the witness Garrett and his conduct to said jury and asserted that if your petitioners felt themselves aggrieved at said court's charge *charge* them they could appeal to the supreme court of the State of North Carolina, all which acts and doings by said judge of said court being so, the agent and officer of said State of North Carolina charged with the due administration of its laws, therein and thereby denied to your petitioners the due and equal

protection of the laws of said State, and therein and thereby wrongfully caused, precipitated and brought about the verdict of guilty against your petitioners by said jury. Your petitioners thereupon by their counsel filed their motion for a new trial and to have said verdict of said jury set aside, but which said motion said court denied.

Thereupon your petitioners by their counsel moved in arrest of judgment upon said verdict in said court but which said motion said court denied, and thereupon said court entered judgment upon said verdict of said jury in said cause in words *of the* following:

Judgment of the court that the defendant J. L. Howard, alias Frank Thomson, be imprisoned in the State penitentiary for a term of ten years: judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for a term of ten years: judgment of the court that A. L. Daley, alias *B*onez Bono, be imprisoned in the State penitentiary for the term of seven years. And which said judgment so entered was void and of no effect because in direct violation of the statute of the State of North Carolina as appears in the acts of the legislature of 1887, chap. 355, entitled "An act to provide for the working of certain convicts upon public roads of the State:"

SEC. 1. That when any county has made provision for the working of convicts upon the public roads, or when *victs upon the public roads, or when* any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful for, and the duty of the judge holding court in such counties, to sentence to imprisonment and hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jails or in the State prison, the following classes of convicts: first, all persons convicted of offences the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise sholly or in part be imprisonment in the penitentiary for a term not exceeding ten years."

Unless as provided in section 4 of the said act "That in all cases where the judge presiding shall be satisfied that there is good reason to fear that an attempt to release or to injure any person convicted of any of the offences mentioned in section one of this act, class second, it shall be lawful for the judge to sentence such convicts to imprisonment in the penitentiary, as is now provided by law: *Provided* That no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, or attempt to commit rape, or arson, shall be assigned under this act: *Provided*, That this act shall not apply to the counties of Jackson, Swain, Macon, *E*herokee, Clay and Graham," said county of Guilford having adopted said road act Sept. 18", 1894. The conditions of said section four not having been so found by said court and made part of its judgment in said cause do not relieve the judgment and sentence so inflicted as aforesaid, and that the same not being so found said court had no jurisdiction or power or authority to enter said judgment or inflict or impose

said sentence in said State's prison against your petitioners, and that the same is therefore wholly void and of no effect.

Your petitioners further answering aver that the June term 1901 of said Guilford county superior court opened on the 4th day of said month of June and terminated on the 11th day of said month of June, and that your petitioners prayed and *was* allowed an appeal to the supreme court of said State, and that the said actings
41 and doings against them in said superior court were duly made record of, protested against, presented and certified to said supreme court at the August term thereof 1901, and wherein your petitioners prayed and sought relief against the wrongs inflicted, discriminations made, and the equal protection of the laws of the State of North Carolina, denied to your petitioners, and that they so prayed without avail in said supreme court, and that by its judgment the acts and doings of said Guilford county superior court and the judgment entered therein were by said supreme court affirmed and that thereby your petitioners were discriminated against, denied the equal and just protection of the laws of the State of North Carolina as guaranteed to them by the constitution of said State and by the 13th and 14th amendments to the Constitution of the United States, and therein and thereby your petitioners were grievously wronged and injured.

Your petitioners further answering aver that it is true that the so-called true bill or indictment returned in said Guilford superior court contained three counts: First of which a charge of conspiracy to cheat and defraud without more; second a conspiracy to rob by force, and intimidation, third to conspire to cheat and defraud without more. That to said indictment so returned your petitioners in apt time moved the court for a bill of particulars on each count of said indictment, and which said motion was by the court denied and thereupon moved to quash the same on grounds aforesaid which motion was denied. That at the close of the State's evidence the State solicitor *nolli pros-* the second and third counts, thereby striking them as completely out of the record as though never in it, and relied for judgment on the said first count.

Your petitioners aver that each count in an indictment must be sufficient in its averment to constitute a distinct charge of crime, and so full and plain as to apprise the accused of the nature and cause of the accusation against him and to enable him to prepare and make his defence thereto, and sufficient to be a bar to a
42 second prosecution for the same offense; and that said first count of said indictment was not so sufficient, did not charge an offense known to the law, statutory or other, of the State of North Carolina, and that the same could not be in law aid*d*ed by the said second and third counts in said indictment for any purpose in law and that it was not so aided in said cause, and that therein and thereby your petitioners were denied due process of law and the equal protection of the laws of the State of North Carolina as guaranteed by its constitution and the Constitution of the United States.

Your petitioners further aver that the opinion of the supreme court of said State in said cause in forming said judgment and hold-

ing said first count of said indictment good and sufficient in law, denied your petitioners due process of law and equal protection of the laws as aforesaid, and the truth and fact of which your petitioners aver is clearly and well presented in the dissenting opinion of Mr. Justice Douglas, rendered in said cause in said supreme court, a copy of which is hereto annexed, as part hereof, marked "Exhibit A."

Your petitioners further aver that by the said judgment of said Guilford superior court and its affirmance by said supreme court your petitioners have been denied the rights and privileges guaranteed to them by the constitution of the State of North Carolina and the Constitution of the United States, of the liberty of speech and the making of contract due and lawful in its terms and object, and that in the exercise of their right and privilege under the Constitution and laws aforesaid your petitioners had the right and privilege to meet and confer, converse and contract with said Paul Garrett in the manner, in the way, in the words, on the terms, conditions and consideration as they did, and as they were shown to have done in said record, and that their doings and actings in that behalf were the exercise of a right and privilege guaranteed to them by the constitution of said State of North Carolina and the Constitution of the United States, and that said charge against them and their conviction thereunder as aforesaid was a violation
43 of their said constitutional rights and privileges and abridgement of their privileges as citizens of the United States, they being such citizens, and as citizens of a State other than North Carolina, and as citizens of the State of North Carolina, and that in consequence your petitioners have been discriminated against and denied the equal protection of the laws of said State of North Carolina, by the courts of said State, and that in consequence the judgment of said Guilford superior court and the affirmation thereof by said supreme court is an invasion of the constitutional rights and privileges of your petitioners in the respects aforesaid, and that their privileges and immunities were and are thereby abridged.

Your petitioners further answering aver that the sentence so imposed and inflicted upon them by said Guilford superior court and the affirmance thereof by said supreme court, was cruel and unusual and greater than ever imposed or inflicted by its courts in said State for the like or similar offense, and it was and is and each one of them was and is in *the* violation of the constitution of the State of North Carolina as interpreted by this court and in violation of the eighth amendment of the Constitution of the United States, and in violation of section 4 of the fourteenth amendment of the Constitution of the United States in this that it is a denial by the courts of the State of North Carolina of the du- and equal protection of its laws and is therefore void.

Your petitioners further aver that the said Guilford superior court rendered its judgment as to infliction of penalty against your petitioners under section 1097 of the Criminal Code of North Carolina, which is in the words and figures as follows: viz: "Punishment for misdemeanors not specified. Offences made misdemeanors by

statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offence be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment
44 in the county jail or penitentiary, not less than four months nor more than ten years, and be fined."

That the indictment so returned against your petitioners in form and words charges the said supposed offences as a felony and that if said offense be so a felony, section 1096 of the criminal code of North Carolina would limit the maximum extent of punishment that would apply to such a felony, and which section is in the words, viz: "Punishments for felonies not specified. Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute, shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or penitentiary, not less than four months nor more than ten years, and be fined."

Your petitioners further aver that Guilford county in the State of North Carolina, has b- and through a resolution of the commissioners of said county heretefore, to wit, on the 18th day of Sept. 1894, by solemn resolve in executive session adopted the road system provided for in chapt. 365 of the Laws of North Carolina, passed by its legislature in 1887, and that from thence hitherto said county has had and kept in force and the same still is in force in said county for the working of convicts whose term of imprisonment coincides with section one of said chapter. That said adoption by said county commissioners in said county brought said chapter 355 of the Laws of 1887 of North Carolina into force in said county and binding and obligatory on the judge holding terms of the superior court of said State in said county, and was so obligatory on said court and the judge thereof during the trial and at the time of sentencing and entering judgment against your petitioners in said cause, and that said judge of said court in said cause had no jurisdiction or power to enter in said cause any other judgment or order or decree than was provided for in said chapter 355 of the laws of North Carolina passed by its legislature in 1887, and that in
45 consequence the judgment so entered in said cause in said court by the judge thereof as aforesaid was so entered without jurisdiction and was void, and was a discrimination against your petitioners and a denial to them of the equal protection of the laws of said State.

"Your petitioners further aver that the said supreme court of said State of North Carolina had no jurisdiction or power to form said judgment of said Guilford superior court and that their acts in that behalf were without authority or jurisdiction, and that the same was and is void, and so a denial of the equal protection of the laws of said State as aforesaid. * * *

"Your petitioners further aver that said judgment so entered by said Guilford superior court and affirmed by said supreme court is an entirety and that on the 13th day of December 1901 your peti-

tioners were thereunder taken to and imprisoned in the penitentiary of the State of North Carolina at Raleigh where they have ever since been and now are, and that said judgment has been fully put into execution and in part satisfied.

"Your petitioners further aver that the action of said Guilford superior court in entering said judgment against your petitioners was a denial to them and each of them by said court of the equal protection of the laws of the said State of North Carolina and that the affirmance thereof by the supreme court of the State of North Carolina was a further denial to your petitioners and each of them of the equal protection of the laws of said State in violation of the 14th amendment of the Constitution of the United States and the constitution and laws of the State of North Carolina, and that the said imprisonment of your petitioners was and is unlawful and a denial of the equal protection of the laws of said State, and that your petitioners are now confined in said State penitentiary under a void judgment and void execution and void commitment, and that being so wrongfully and unlawfully deprived of their liberty against their will they are entitled to be relieved therefrom.

"Your petitioners further aver that it is not true that they or either of them at any time ever met a Mr. Wheeler, resident of South Carolina or dealt with any person resident of said State or from said State, or obtained from any such person any sum
46 of money at any time by any means whatever, or that they or either of them was ever in the State of South Carolina.

"Your petitioners further answering aver that they nor either of them cheated or defrauded any man, company or concern either in the State of South Carolina or the State of Iowa, and aver that such prosecution or prosecutions, if any, there be made or laid against them in either of said States, that the same are founded in fraud and perjury and are urged to harass and oppress your petitioners and to prejudice them in their strife for justice in this community and before this honorable court.

"Your petitioners further aver that there is no law, statutory or other in the State of North Carolina known as a 'habitual criminal act' or any law authorizing or justifying or sanctioning the enhancing of punishment of one convicted of crime in said State because of previous convictions against such a convict, and that said judge of said Guilford superior court in taking into account the unsupported rumor of charges in other States against your petitioners and allowing same to enhance the punishment imposed and inflicted in the particular case as was done against your petitioners as in the return of respondent herein set forth was a denial to your petitioners by said court of the due and equal protection of the laws of the State of North Carolina in violation of the constitution of said State and said fourteenth amendment; and that the judgment of said court so rendered abridged the rights, immunities and privileges of your petitioners & was and is unlawful cruel & barbarous,

"Your petitioners further aver that because said judgment so imposed and rendered against them has been put into full execution and a part thereof been suffered and satisfied, that they could not

prosecute a writ of error to the United States Supreme Court with supercedeas and obtain their liberty upon terms of bail pending a hearing and consideration thereof and that they are wholly without means to bear the expense of such writ. That they have been
47 confined in jail and State's prison since the 23rd day of March 1901, and that the expense attendant upon the defence made by them in said Guilford superior court and S-ate supreme court impoverished them and their said friends to such an extent that they are whol-y without resources to make or prosecute a writ of error to the Supreme Court of the United States or to avail themselves of a right other than this writ of *habeas corpus*.

Your petitioners further aver that the copy of the judgment annexed to and made part of their petition herein and as referred to by respondents in his return and answer herein is a true and correct copy of the judgment rendered and entered in said cause against them; and that the printed record referred to and certified copy of the record hereto annexed and made part of respondent's return herein is a true and correct transcription of the record of the proceedings had in said cause against your petitioners in said Guilford superior court and that as appears therein and thereby the said proceedings were had and conducted against your petitioners, in their absence from said court during the progress and trial as there reported; and that said Guilford superior court as appears by said record denied your petitioners and each of them their constitutional right and privilege of being present in court to hear and take part in every step in the progress and hearing of the said felony charged against them; but all which your petitioners aver said record does not show was the fact, done or performed by said court and in this that they were denied the just and equal protection of the
48 laws of said State by the courts thereof and that the same was not due process of law under the 14th amendment of the Constitution of the United States.

"Your petitioners further aver that the said judgment of the said court so entered, copy of which is annexed to and made part of your petitioners' petition herein and admitted as correct by the return and answer to the writ of *habeas corpus* herein by Capt. J. M. Fleming, respondent, thereto is insufficient in form and substance to show and does not recite facts sufficient in law to show that due process of law was observed or had in the rendition thereof against your petitioners; and your petitioners aver that the same is not in form and substance a sufficient warrant or justification on which to commit, retain or continue your petitioners in custody in the penitentiary of the State of North Carolina at Raleigh; and their presence and holding there is against their will, and is illegal and void; and a discrimination against and denial to them of due process of law and the equal protection of the laws of the State of North Carolina as the same are usually, regularly and customarily administered in said State against the citizens thereof; and is in violation of their rights and privileges as guaranteed to them under the 13th & 14th amendment- of the Constitution of the United States.

"Your petitioners further aver that this honorable court has the

jurisdiction to grant the writ of *habeas corpus* to inquire into the cause of the restraint of liberty under sections # 751 to # 766 both inclusive of the Revised Statutes of the United States and thereunder to do unto justice what the law commands; and to relieve and discharge your petitioners from their present unlawful detention and restraint against their several wills; and for and on account of the several grounds hereinbefore in their said petition alleged and in this their replication to the return of respondent herein etc.

"Your petitioners further answering deny each and every
49 other matter or fact and the sufficiency thereof in said re*spondent's return* and answer herein; not herein specifically answered or denied and hereby or herein admitted as true.

Wherefore your petitioners pray to be discharged from the custody and detention of them by the said Capt. J. M. Fleming warden of the penitentiary of the State of North Carolina and for such other and further relief as to justice may seem meet."

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALY,
Petitioners.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Petitioners.

Circuit Court of the United States, Eastern District of North Carolina, at Raleigh.

J. L. Howard alias Frank Thompson; A. L. Daley, alias Gonez Bono and H. D. Hawley being first duly sworn deposes and says that the above and foregoing — replication and answer by them subscribed to the return of the respondent Capt. J. M. Fleming to the writ of *habeas corpus* issued herein; they have read and know the contents thereof and that the same is true as they verily believe.

J. L. HOWARD.
H. D. HAWLEY.
A. L. DALY.

Subscribed and sworn to before me this 28 day of December 1901.
N. J. RIDDICK, *Clerk.*

50 STATE OF NORTH CAROLINA, }
Guilford County. }

Be it remembered that at a regular term of the superior court begun and held for the county of Guilford at the court-house in Greensboro on the 3rd day of June 1901 Honorable W. B. Councill, judge presiding, the following proceedings *was* had:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictmen.	Conspiracy.

Motion by defendants to separate witnesses and court states that he would not exclude from court-room the high sheriff of the county nor his deputy nor the principal witness for the prosecution; and the court further states that this is a matter discretionary with the court and considering the high moral character of the witnesses above mentioned declines the motion. Defendants except to the remarks of the court. The remarks of the court were made before jury was passed upon by either State or defendants.

In this case the following jury — sworn and empannelled. Frank Barber, B. B. Myers, G. M. Rumley, J. Q. Curtis, W. S. Holt, J. W. Busick, A. M. Farrington, D. M. Glass, S. H. Coltrane, C. H. Fields, W. A. Heath, G. K. Briggs.

J. R. Robinson sworn as officer of the jury, pending trial. Court takes a recess until 9.30 o'clock tomorrow morning.

Saturday morning June 8th 1901 court meets at 9.30 o'clock and the following proceedings — had:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment.	Conspiracy.

51 Trial resumed, pending trial court takes a recess until 9.30 o'clock Monday morning.

Monday morning June the 10th 1901 court meets at 9.30 o'clock and the following proceedings are had.

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment.	Conspiracy.

Trial concluded and the jury for their verdict say—defendants guilty.

Tuesday morning June the 11th 1901 court meets at 9.30 o'clock a. m. and the following proceedings — had.

STATE *vs.* J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.	Indictment.	Conspiracy.

Defendants are again brought into court, motion by defendants to set aside verdict—motion denied—motion by defendants for new trial—motion overruled—motion in arrest of judgment—motion

denied—motion of solicitor for judgment—judgment of the court that the defendant J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that the defendant A. L. Daley, alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven years.

Defendants except to the sentence as pronounced by the court and appeal to the supreme court. Notice of appeal waived in open court.

Appeal bond fixed at the sum of fifty dollars or otherwise allowed to appeal as the law allows.

52 By consent defendants allowed fifty days to serve case on appeal and State allowed thirty days thereafter to accept case on appeal or file counter-case.

Bail bond for defendant J. L. Howard, alias Frank Thompson fixed by the court at the sum of five thousand dollars.

Bail bond for the defendant H. D. Hawley fixed by the court at the sum of five thousand dollars.

Bail bond for the defendant A. L. Daley alias Gobez Bono fixed by the court at the sum of three thousand dollars.

STATE OF NORTH CAROLINA, *Guilford County,* } ss:

I John J. Nelson, clerk of the superior court of said county do hereby certify that the foregoing is a true and correct copy of the trial and judgments in the case State *vs.* J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley as same appears upon record in my office.

Witness my hand and official seal this the 26th day of December 1901.

JOHN J. NELSON,
[SEAL.] *Clerk of Superior Court.*

53 STATE
v.
HOWARD ET AL.

MONTGOMERY, *J.* concurs in the conclusion reached by the court. He thinks however that what his honor said on the trial below in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendant's counsel on the witness' testimony was inappropriate and indiscreet. The language of the statute on the subject may not have been violated, but its spirit certainly was.

54 EX. "A."

STATE *vs.* HOWARD. } #289. Guilford.

DOUGLAS, *J., dissenting:*

In dissenting from the opinion of the court, which I am constrained to do upon the highest considerations of private right and public policy, I feel much diffidence in expressing my own opinions as they are so totally different from those of the court. However, they are the result of my deliberate judgment, and as such must find expression, as I cannot even silently concur in a decision which to me seems so dangerous in its tendencies and so devoid of legal basis in its conclusions.

I have no sympathy whatever for a gold-brick swindler, and but little for his victim, who is usually caught in the trap he thinks he has set for another. The ordinary business man has no earthly use for gold, except for what it will bring in the market, and no object in buying it unless he can resell at a higher price. Therefore he always expects to get it for less than its value from a supposed owner who must be ignorant of its value. He knows, or should know, that gold is current the world over, and that any one having it can carry or send it to the nearest mint and obtain its full value in current coin. Usually the pretended miner professes to be very ignorant, or has a partner who is even more ignorant than himself, and whose interest may be *bought out* at a small sum.

In the case at bar the inducements offered Garrett appear to have been $25 per day and his expenses, together with a "one-third interest in everything he had," including $36,000 in gold at Greensboro, $48,000 in gold in Arizona, and a gold mine capable of producing one million dollars a year. In consideration for such great wealth, Garrett was to give *his services only;* and yet in his suit for a total breach of this contract, he places his damages at the modest sum of $2,000. (Printed Record pp. 15, 41, 47, 48.) Again he says on page 42: "It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction." It would seem so.

There is nothing in this case that appeals to my sympathies, and hence I am free to view it in its legal aspect. I believe that the defendants are all guilty, but this will not induce me to deny to
55 them a single one of the rights which the law gives to them for their protection. I do not believe that the sole purpose of the law is to punish the guilty. A higher object still is the protection of the innocent; but whether innocent or guilty, every citizen is entitled to a fair trial and the equal protection of the laws. As was said by this court in State *vs.* Keith, 63 N. C. 144: "These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any court sitting on

American soil sanction their violation." This case finds it counterpart in the great case *Ex parte* Milligan, 4 Wall. 2, great in the court that decided it, great in the counsel who argued it, great in the ability of its opinions and greater still in the principle it settled. Milligan was, before the close of the war, tried and convicted by a court-martial of conspiracy, followed by overt acts, to seize the Federal arsenals and set free and arm the Confederate prisoners. It was held by a unanimous court that he was entitled to a trial by jury according to the law of the land.

The opinion of the court uses the following language on page 18: "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."

In this spirit I approach the case at bar. The defendants may be guilty and deserve their sentence, but to deny them a fair trial would be a wrong, not to them alone, but greater still to the
56 integrity of the law in the preservation of which every citizen has the supremest interest.

To begin with, I am opposed to any further extension of the doctrine of conspiracies, which in this State has been already carried far beyond the danger line. The court seems to rely principally upon the cases of State *vs.* Buchanan, 5 H. & J. (Md.) 317; State *vs.* Brady, 107 N. C. 822, and State *vs.* Younger, 12 N. C. 357. Buchanan's case is regarded as one of the leading cases, and will probably continue to be so regarded as long as judges, impressed with its apparent learning, take for granted its citation. But I am free to say that the argument of the learned counsel for the defendants has convinced me that that case is not only inherently vicious upon its face, but is founded upon a large array of miscitations and embellished with a vast amount of misinformation. For instance, that case holds "that an indictment will lie at common law for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only." What limit is there to such a definition, and what is meant by the word "immoral"? In its widest sense it might mean any act, which in the opinion of the court was contrary to private morality or revealed religion. Can this be the law anywhere? Certainly not in this State unless made so by Brady's case or that at bar. I do not think that Brady's case goes that far in that direction; but on another point it does go beyond any case within my knowledge. Without any citation of authority, and by some process of reasoning incomprehensible to me, it holds that the court

below *properly refused* an instruction that "*though the representations might be false, if the defendants honestly entertained the opinion they were true, they would be not guilty.*" I can only say that such a ruling is in my opinion without foundation in law or justice, and I regret that it should be found in an opinion of this court. It is true the court says that the "court properly refused them in the words asked," but as the words themselves were unobjectionable, and the instruction does not appear to have been given in any words, the qualification of the court merely emphasizes the refusal.

The opinion of the court before us cites Younger's case as holding that "a combination of two or more to do an unlawful act,
57 or *one prejudicial to another*, is indictable at common law as a conspiracy." This is in the syllabus but not in the case. What the *court* said was "that every conspiracy to injure individuals, or to do acts which are unlawful, *or prejudicial to the community* is a conspiracy, and indictable." There is an essential difference between being prejudicial to the *community* and only to an individual. In that case the offence was a conspiracy to cheat by gambling, which was in itself unlawful.

Younger's case is moreover in direct conflict with the opinion of the court as to the antiquity of the present doctrine of conspiracies, as in that case Chief Justice Taylor, perhaps more learned in the ancient common law than any judge who has ever sat upon this bench, says that "conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law."

But it may be said that the swindle which these parties contemplated was so clearly a crime that some of this discussion has no necessary application. Admitting that to be true, I am now discussing the opinion of the court. If it goes beyond the facts of this case, so must I. If it gives its unqualified approval to the cases of Buchanan and Brady, with all their inherent errors and vast possibilities of danger, then I must express my disapproval in terms equally plain; and if any unguarded words of mine may appear too strong, I know my brethren will ascribe them to their true motive—the strength of my convictions. The opinions of this court are not mere decisions of pending cases. If they were, mere *per curiam* judgments would suffice, at least in cases of affirmation. The real object of the *opinion*, as contradistinguished from the judgment, is to lay down general principles as applied to a certain state of facts for the determination of all future cases of similar nature. The mere character of the defendant does not affect the principle. It is only a gold-brick man today, but who may it be tomorrow? Among the *general principles* resulting from the opinion of the court and the cases it specifically approves are the following: That an indictment for conspiracy will lie at common law, (1) "For a conspiracy to do an act not illegal, nor punishable if done by an individual,
58 but immoral only;" (2) for "a combination of two or more to do any unlawful act, or one prejudicial to another," individual; (3) that "though the representations (relied on to convict)

might be false, if the defendants honestly entertained the opinion they were true, they would be * * * guilty."

From these propositions of law I emphatically dissent. My own views as to the dangers attending the expansion of the doctrine of conspiracies cannot be better expressed than in the following words of Judge Campbell, in delivering the opinion of the court in People *vs.* Barkelow, 37 Mich. 455: "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons by throwing a drag-net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges which in exciting times juries and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected." This opinion, concurred in amongst others by Judge Cooley, shows not only the great learning and clear comprehension of the present of those eminent jurists, but also their prophetic grasp of the possibilities of the future. A few years later the English doctrine found its legitimate outcome in Regina *vs.* Parnell, 14 Cox 508, where the great Irish leader with others was indicted for a conspiracy to impoverish owners of land in Ireland by soliciting their tenants not to pay rent. Lord Fitzgerald in summing up the case to the jury said that it was plain and clear that an agreement of two or more persons to commit any wrongful act was an indictable offence. "If," said he, "a tenant withholds his rent, that is a violation of the right of the landlord to receive it; but it would not be a criminal act in the tenant, though it would be in the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is, by the law of the land, an offence." Is
59 not this equivalent to saying that a bare agreement of two persons to break a simple contract, or to induce another one to do so, is a crime? I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons; and if the English rule prevails in this State, what is there to prevent the indictment of the members of our usual labor organizations?

I am further of the opinion that the first count in the indictment, on which alone the defendants were tried, is not sufficient either to put them upon their guard or to furnish the basis for the future defence of former conviction or acquittal. Again, the English rule is invoked, but there a bill of particulars is granted practically as a matter of course. The court in its opinion cites section 259 of the Code to the effect that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." If this section applies to criminal actions, which I doubt, it cannot help this case because the judge *refused* the request. Whatever might have been the effect of a bill of particulars if it had been furnished, surely the refusal of the court to grant it cannot validate an indictment insufficient in itself.

But again the court says that the solicitor for the State need not have elected between the counts, but he *did* elect, and *nol prossed* all but the first count. Those counts are therefore as much out of the indictment as if they had never been in it. But the opinion says that the second and third counts gave the defendants the information they desired. Can it be that a defendant is required to go to a bill of indictment that has been *nol prossed* to find out the meaning of the bill on which he is tried? I am aware of the line of decisions that it is not necessary to set out the particular means by which the cheating was to be accomplished, that is, the indictment need not state each particular act or false pretense upon which the State relied, because this would be impracticable; but it *must set out enough to constitute a crime, and to identify that particular crime with reasonable certainty.* Suppose an indictment were to charge simply that John Smith did in the year 1900 in the county of Wake attempt to steal from William Jones, would any one suppose that
60 Smith could be convicted? Again, suppose that Smith was indicted for attempting to burn a *barn* in the year 1900 and in the county of Wake, could he be tried for attempting to burn any or all of the numerous barns in Wake county that may have been in existence during the year 1900 or any other year within the legal radius thereof? But, forsooth, if Smith is indicted for *conspiracy* to burn some indefinite barn, without burning or attempting to burn any barn whatever, then nothing more need be said. If such is the law, then I am ignorant of the law.

There are several errors, which, for want of time, I must pass over or notice only in the briefest possible manner.

I think the admission in evidence against Hawley of the card bearing his name was fatal error. This card was found in Howard's possession *after* his arrest. There is no evidence that it was ever in Hawley's possession and no suggestion that it is in his handwriting. When shown to him he denied all knowledge of it. It might as well have borne the name of any prominent citizen of Greensboro or State official. Would it then have been evidence against any one? If not, why should it have been evidence against Hawley? The majesty of the law is such that the loftiest are within its reach and the lowliest within its protection.

Passing over other points, I come now to two errors, similar in nature but occurring at different stages of the trial, either one of which is sufficient to entitle the defendants to a new trial, and the combination of which renders it morally impossible that they should have had such a trial as they are entitled to by "the law of the land."

The record shows that after the case had been called for trial and the defendants had pleaded not guilty, and while the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and empaneled and during the trial of said cause. The solicitor objecting, said that the witness Paul Garrett would be the first witness examined and the others would testify as to matters not in his knowledge, except the detection in Greensboro.

Whereupon the court remarked "that it was a matter of discretion with the court, and that all the witnesses except the com-
61 plaining witness, Garrett, and the high sheriff of the county, might be excluded from the court; but as to those witnesses, *their high character as citizens forbade the idea that either of them would be influenced by the testimony of the others!*"

This remarkable statement of fact by his honor was made in the presence of the jury, after the case had been called for trial, and in passing upon a motion in the action. It was not necessary, as he could have refused the motion in his discretion without giving any reason, or he might have given the reason suggested by the solicitor, which would have been harmless His testimony to the high character of Garrett could not have been stronger even if he had been a witness; and can we suppose that the jury would not be influenced by such a statement coming from the judge as to the character of a witness personally unknown to them? Taken in connection with his subsequent charge—and the jury must have connected the two—its practical effect was to withdraw from their consideration the credibility of a witness whose testimony was absolutely essential to the prosecution. The opinion suggests that the jury may not have heard the remark. Such a suggestion comes from the court alone. The evident gist of the exception is that the remarks were made in the presence of the jury and were calculated to influence them. The attorney general in his able brief for the State, says: "It is conceded by the defendants in their third assignment of error, page 111, that 'these remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room, *in the jury-box.*'" The italics are mine. He never for a moment suggests that they were beyond the hearing of the court, but proceeds to argue that the defendants' remedy was to "have taken steps looking to the elimination of such jurors as might have been affected by the remarks of his honor."

The opinion refers to the English rule permitting judges to express an opinion upon the facts, but this rule has long ceased to prevail in this country. Even where it still lingers, it is coupled with the obligation upon the judge to instruct the jury that they are not bound by his opinion of the facts. The general rule is thus
62 clearly stated in 11 Enc. Pl. & Prac. 97: "As stated in a preceding section, the practice in most States forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule as will be subsequently shown, *is most stringently enforced.* Not infrequently judges evinced partisanship in their charges, and moulded verdicts to their will; and juries as frequently shirked responsibility and really adopted the opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and *to secure the constitutional right of trial by a jury* and *not* by a judge, that the various limitations upon this common-law power were imposed by the Constitution or by statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate powers of the jury, and to prevent the court from overstepping the line which separates law from

fact. 'Trial judges cannot legally indicate their opinion either expressly or impliedly, *intentionally or otherwise*, as to the credibility of the witnesses, or as to the truth of any fact at issue, and the subject of the evidence.'" In support of this rule five or six hundred cases are cited of which twenty are from this State. The common-law rule was expressly abrogated in this State by the act of 1796, now Code section 413, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury." From the first this statute has been uniformly given a liberal interpretation in order to carry out its essential principles; but now for the first time this court proposes to overrule the settled policy of a hundred years, and adhere to the exact letter of the law. This necessarily involves overruling numerous decided cases, amongst others those of Reel *vs.* Reel, 9 N. C. 63; State *vs.* Dick, 60 N. C. 45; Wiley *vs.* Gatling, 70 N. C. 410; MacRae *vs.* Lawrence, 75 N. C. 289; Crutchfield *vs.* Railroad, 76 N. C. 320; State *vs.* Dancy, 78 N. C. 437; State *vs.* Jenkins, 85 N. C. 544.

There are numerous other cases enunciating the same principle, but I have cited those only in which a new trial was granted.

63 In all of these cases a new trial was ordered, although none of them came within the letter of the statute, inasmuch as the judge did *not* "give an opinion whether a fact is fully or sufficiently proven." In some of them he was not even addressing the jury, as in Dick's case. In that case this court says, "On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State that after the other evidence already given in the cause, he, the solicitor, might withdraw them if he chose to do so, which the solicitor declined. This seems to us an expression of opinion on the part of the judge, that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested. * * *" "The object" (of the statute) "is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice—that the judge of the law should not undertake to decide the facts. *If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo.* * * * This we suppose has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was without some such provision constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger also from the ever-active principle that power is always stealing from the many to the few."

The court has said in State *vs.* Davis, 15 N. C. 612, speaking by Gaston, J.: "It is obvious that if we confine ourselves to the *words* of this statute (act of 1796), there is no ground for the complaint which we are now considering. But it has been long since settled that the litteral is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this court has fixed its intention upon the purposes declared in the act, and has given to it such a construction as, it believed, would most effectually accomplish these purposes. * * * But if in doing all this, he (the judge) intimates his individual opinion as to the existence or non-existence of a controverted fact; on which side of the controversy he believes the truth to be, or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he overleaps the boundary of duty and invades the peculiar and exclusive province of the jury."

This court has said in State *vs.* Jones, 67 N. C. 285: "This (the statute) has been held to mean that the judge shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of the evidence. This construction, in the last particular, *goes beyond the words of the act*, but it is accepted as a proper one."

In State *vs.* Dixon, 75 N. C. 275, this court has said: "This
64 statute is but in affirmance of the constitution, article 1 sections 13–17; and the well-settled principles of the common law as set forth in *Magna Charta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and *any inference* by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law."

In Crutchfield *vs.* Railroad, 76 N. C. 320, this court granted a *venire de novo* because the judge below in his charge to the jury said that "it was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession and that he appeared to be a gentleman of culture." In that case the court says, on page 324, "Nor does it matter if his honor was (if he was) speaking of another part of Dr. Bahnsen's testimony when he put his estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the *man* and it attached to every part of his testimony. A judge ought not to state to the jury his estimate of a witness or how he appears to him."

In MacRae *vs.* Lawrence, 75 N. C. 289, a new trial was granted by this court because the judge below, referring to two witnesses whose testimony was conflicting, charged the jury "that both the witnesses were gentlemen and that it was a pure matter of memory." This court holding that such an expression was fatal error, says: "Again, one of two witnesses, where they differ, may be corrupt. And the party against whom his evidence is may so insist before the jury, and his honor cannot tell the jury that he is not corrupt but that he is a 'gentleman.'"

If it is fatal error for the court to tell the jury that the principal

witnesses on each side are *both* gentlemen, how much greater error is it for the judge to single out the prosecuting witness alone, and say that he is a gentleman of such high character that his veracity must not be questioned.

But it is said that this remark was made before the jury was empanneled. With all due respect for the court, this seems to me the purest technicality. If it is not *haerens in cortice*, it is because it does not reach the inner bark.

65 It is true the jury had not been *empaneled*, but the case had been acIled for trial and the regular venire was in the jury-box. The remark was not a mere "passing compliment" but a statement of fact upon which his honor based his ruling on a motion in the action itself. It did all the harm it could have done if it had been in the charge, and is clearly in violation of the act which this court has repeatedly said in substance confers no new right, but is simply in affirmance of the constitution of this State and the principles laid down in *Magna Charta*.

And yet it is proposed to overrule so many cases, and establish so dangerous a precedent, upon an immaterial ruling in Jacobs' case sustained by a mere dictum in Jackson's. Let us examine those cases. When Jacobs' case was here in the 107th Reports, no allusion whatever was made to the point before us. When the case was first here, 106 N. C. 695, the court says: "It is difficult to see how the remark of the judge (that he had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity) violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proved.' No facts had been shown in evidence. Indeed, had the jury been empaneled, the statute prohibited the judge 'from expressing an opinion only upon those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.'" If the remark was not made in the presence of the jury, and would not have been improper even if the jury had been empaneled, what difference did it make whether the jury was empaneled or not?

In Jackson's case, 112 N. C. 851, the objectionable remark was made, not by the judge, but only by a *bystander;* and yet the opinion proceeds to say that "remarks made by the judge on such motions do not come within the prohibition of the statute." Citing State *vs.* Jacobs. As the judge had made no remark whatever, this was a pure dictum. And yet these two are the only cases which are even claimed to furnish any authority for the position of the court.

66 I come now to the last exceptions that I shall discuss. These two exceptions are addressed to the following portion of his honor's charge: "Reference has been made by counsel for the defence to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge, and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the

evidence, as disclosed by the testimony of Garrett, satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime, his course is not only proper but is commendable. If he came under the impression that the business transaction was a legitimate and honest one, by means of which he would be able to acquire legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism."

His honor apparently proceeded upon the assumption that there were only two possible constructions to place upon Garrett's conduct, either that his purpose was to detect crime or to engage in a legitimate business enterprise, one of which was proper and the other commendable. No other hypothesis seems to have entered his honor's mind, or to have been left to the jury. Taken in connection with his previous ruling as to Garrett's high character, what was left for the jury except to convict? If they believed Garrett, they must find at least two of the defendants guilty, Howard and Daley. Without Garrett, they could find no one guilty. The defendants did not introduce any testimony, but relied upon their legal presumption of innocence. If they could impeach Garrett they would be
67 acquitted, and this they attempted to do by a rigid cross-examination. Whether they succeeded was for the jury alone to say, without any intimation whatever from his honor as to the weight of the evidence or the credibility of the witnesses. The parts of Garrett's testimony relied upon by the defendants for his impeachment are thus set out in their brief: "Garrett, a man of wealth, is approached by defendant Howard and has laid before him a proposition to take him into partnership in a gold mine, with immediate compensation for a time at $25. per day and expenses, and incidentally the probable purchase by him, Garrett, of some $12,060. worth of gold. (Record 22, 23, 24) Howard at this interview exhibited a large roll of bills (Rec. 39) and paid Garrett $10. on account. (Rec. 25.) Garrett accepted this money and Howard left the office, having appointed a rendezvous two days later at Greensboro. Garrett testified that at this interview he made up his mind Howard was a confidence man (Rec. 42) and as the latter crossed the street on leaving Garrett's office, Garrett pointed him out to two of his employees, with the remark, 'If you want to see a genuine gold-brick man look out of the window, quick' (Rec. 18). His faith in Howard was so small that he even suspected the $10. bill paid him to be counterfeit (Rec. 18). What then was the duty of Garrett when his mind first reached the conclusion that Howard was a con-

fidence man, a 'gold-brick man.' Clearly it was to order him out of his office with a threat to denounce him to the authorities. He might well have gone farther. He might have informed the sheriff or the police of his interview and of his suspicions, leaving to them the duty of dealing with Howard and the others. What he did was to put himself into communication with the chief of police at Richmond, Va.; he wrote a long letter to Patterson, accompanying it with a letter of introduction of Mims from Lewis (Rec. 25). All this was to lay an elaborate plan to apprehend the defendants, for whom, by the way, he believed there was a reward outstanding of $20,000. (Rec. 45). He then gave his letters to Mims, and so solicitous was he that there should be no failure of justice, and, incidentally, that he should not fail of the reward, that he gave Mims $20. or $25. for expenses (Rec. 45). Thus his arrangement for arrest having been completed, he set about enticing de-
68 fendants into a completion of the supposed objects of the conspiracy. He had previously, at his first interview with Howard, so far fallen in with Howard's plans as to make two drafts of a telegram, one to use if the Indian were amenable, the other in the event he were not (Rec. 17). On the second day after the interview with Howard, Garrett proceeded to Greensboro to keep the appointment. On arrival he saw Mims and Patterson to whom for 30 minutes he talked 'pretty plainly' and was told that the sheriff had the matter in charge (Rec. 25, 28). There, also, he met Howard, and after he counted Howard's money for him (Rec. 26), the two drove out in a buggy to the place where the Indian was camped (Rec. 29, 30). On this drive, Howard showed signs of backing out, but Garrett urged him on—not once but several times. The sheriff and Patterson passed them on the road. Howard thought they looked suspicious, but Garrett, mindful of his civic duty and the reward and the roll of bills he had just counted, ridiculed the notion. The sheriff and Patterson were 'just two fellows that had been down town and got drunk.' Again, Garrett said 'The next time you stop I am going to take the horse and buggy and go back to town' (Rec. 31). When they arrived at the Indian's camp, Garrett suggested that Howard tell the Indian that he, Garrett, was Andrew Garrett's brother. 'You tell him I'm Andrew Garrett's brother' (Rec. 38). The alleged gold bars were then produced, and just as the weighing was completed the officers closed in and arrested Howard and Daley (Rec. 35). This successfully completed the first half of Garrett's plan. In Com. *vs.* Shea, 9 Phil. 569, which was a case where certain parties induced a saloon-keeper to sell them beer in violation of the Sunday liquor law for the purpose of informing on him, Judge Paxson said: 'For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday liquor law. * * * It was never intended that a man should violate the law in order to vindicate the law.' * * * Immediately after the returning from the scene of arrest, Garrett went to the office of King & Kimball, attorneys-at-law and retained them to appear in the criminal prosecution; and also being still mindful of his civic duty, to prosecute a civil suit for $2,000 against these de-

fendants for an alleged breach of contract (Rec. 48, 49). In
69 aid of this suit he caused an attachment to be levied on the clothes, trunks, jewelry and other personal effects (Rec. 49, 76, 77) including the roll of bills displayed by Howard at their first interview, and which he had kindly counted for Howard at Greensboro just before the arrest. Having secured everything in sight, even to their changes of underwear, this good citizen leaves the State of North Carolina to pay the expenses of defendants in this suit by compelling them to defend *in forma pauperorum*."

Upon this review of the testimony of the prosecuting witness as relied upon by the defendants, it seems to me clear that his honor committed fatal error in his charge, and that a new trial should be granted.

I have given much attention to this case, more than my official duties would justly allow, and much more than the defendants apparently deserve; but I am firmly convinced that there is nothing more dangerous than to attempt to stretch established principles to meet the supposed exigencies of particular cases. I cannot do better than close this opinion with the words of Chief Justice Chase in the concurring opinion in *Ex parte* Milligan, 4 Wall. 2, 132, as follows: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even upon the guilty, unauthorized though merited justice."

70 STATE vs. HOWARD. } # 289. Guilford.

FURCHES, *C. J.*, dissenting:

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses and in what he said near the close of his charge to the jury, that Garrett's conduct was not a proper subject for unfriendly comment.

In my opinion there should be a new trial.

Supreme Court of North Carolina.

I, Thomas S. Kenan, clerk of said court, do hereby certify the above to be true and correct copies of the concurring and dissenting opinion in the case of State *v.* Howard and others, as appear from the originals on file.

In witness whereof I have hereunto set my hand and seal of said court at Raleigh, Dec'r 16, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

71 Ex. B.

NORTH CAROLINA, }
Guilford County. }

Before the board of county commiccioners.

JULY 2ND, 1894.

The board of commissioners met as per adjournment and all members of said board present, namely, J. H. Millis, W. E. Bevill, J. C. Bunch, C. A. Boone and N. A. Hanner, and the following business was transacted:

Ordered by the board that W. E. Bevill, J. C. Bunch and J. H. Millis act as a committee to look after and arrange for working county convicts on the public roads, and that S. W. H. Smith and J. H. Gilmer be requested to meet with them in the register's office July 9th 1894 at 3 o'clock p. m.

REGISTER'S OFFICE, *July 9th*, 1894—at 3 o'clock p. m.

The committee appointed July 2nd met and after consultation and investigation postponed purchasing road machines, etc., until the August meeting or at such time before then as the committee, W. E. Bevill, J. H. Millis and N. A. Hanner may see proper to make such purchases. It was agreed that the county commissioners would only buy machinery at present and that the three named commissioners above are a purchasing committee and are authorized to buy such machines and tools and fixtures as they may see proper at such time as they may deem best.

SEPTEMBER 4TH, 1894.

The board met this day to make arrangements for working county convicts on public roads and to test the new road machine, after which test the board accepted the machine paid for it and appointed Lee Burgman as general manager of the county convicts and also to see after all the machinery, etc., on the road. At above meeting the following resolution was adopted.

Resolved I, That W. E. Bevill of our number be and he is
72 hereby fully authorized and empowered to employ such person as he may deem advisable and on such terms and for such compensation as shall be agreed on to be chief overseer of all convicts assigned to or to — assigned to and to be worked on the public roads in this county under chapter 355, Laws of 1887, and all acts amendatory thereof till the further orders of this board and with the further powers to build or otherwise provide for all needed building- and stockades etc., for the keeping of such convicts and to employ all necessary guards and furnish same with guns and such

other arms as he may deem advisable and to buy, hire for both tools machines teams etc., and do and perform such other things and acts as may be necessary to give effective operation to the resolution passed by the board of justices June last and to this resolution: That in order to carry this suggestion — all orders or warrants for money drawn by the said Bevill on the county treasurer shall be paid by such treasurer in settlement of such claims or debts as the said Bevill shall make in carrying out and giving force to this resolution and of all his acts and doings said Bevill shall make report as often as this board shall demand same.

I do hereby certify that the above is a true and correct copy of the minutes of the board of county commissioners of Guilford county.
This the 27th day of December 1901.

[Seal Office of Register of Deeds, Guilford Co., North Carolina.]

A. G. KIRKMAN,
Register of Deeds of Guilford Co., N. C.

73 And be it further remembered that on the 28th day of December, 1901, at 10 o'clock a. m. in accordance with the order theretofore made as hereinbefore set forth there appeared before the Hon. Thos. R. Purnell, sitting as the circuit court of the United States for the eastern district of North Carolina and in the courtroom of said court, the said petitioners in person and by their attorneys W. P. Bynum, Jr., and L. A. Gilmore; and the said respondent Capt. J. M. Fleming, warden of the penitentiary of North Carolina in person and in his custody bringing the said petitioners and being represented by A. L. Brooks, and T. B. Womack as attorneys, and thereupon said petition of the petitioners and the return of said respondent and the replication thereto of petitioners were by the respective counsel presented to said Hon. Thos. R. Purnell, presiding as circuit judge of said court, and upon due consideration thereof by said court the said court made and entered in said cause an order that the petition be dismissed and the petitioners be remanded to the custody of said warden, to which said order, then and there the petitioners duly excepted, which exception was then and there by the court allowed and signed and sealed and the petitioners thereupon prayed an appeal upon said order and judgment of the court to the Supreme Court of the United States, on their peti-on with assignments of errors in words the following that is to say.

74 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina, Defendant.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and to his associate justices and to the Honorable Thomas R. Purnell, district judge of the United States for the eastern district of North Carolina, sitting as circuit judge of the United States circuit court for said district, Greeting:

Comes now J. L. Howard, alias Frank Thompson and A. L. Daley alias Gonez Bono and H. D. Hawley, petitioners in the above-entitled cause and respectfully represent to the court that they and each of the- are ag-rieved by the judgment of this honorable court in the above cause entered on the 28th day of December 1901 and hereby prays that they be allowed an appeal therefrom to the United States Supreme Court; for the reasons specified in the assignment of errors, filed herewith, and they pray that said appeal may be allowed them and that the files and record in said cause may be sent to the Supreme Court of the United States; and that they may be allowed their liberty pending a hearing and disposition of said cause on appeal upon terms of reasonable bail to be fixed by this honorable court.

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALY,
By L. A. GILMORE,
Their Attorney.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Petitioners.

Appeal allowed.

THOS. R. PURNELL,
U. S. Judge, &c.

[Endorsed:] No. 467 civil. Order allowing appeal.

75 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley
vs.
Capt. J. M. FLEMING, Warden of Prison of North Carolina.

Assignment of Errors.

And now come the above-named petitioners J. L. Howard, alias Frank Thompson A. L. Daley alias Gonez Bono and H. D. Hawley by W. P. Bynum, Jr., and L. A. Gilmore their counsel, said J. L. Howard, A. L. Daley and H. D. Hawley being about to pray this court for an appeal from said court to the United States Supreme Court; and assign the following errors in the above cause, in and from and upon the judgment of said circuit court of the United States for the eastern district of North Carolina.

First. The court erred in not finding from the record and proofs in said cause that the grand jury drawn, and empaneled at the June term of the Guilford county superior court of North Carolina was an illegal body, whose acts were whol-y void; and that the indictment returned by such grand jury on the 5th day of June 1901 in said superior court was void; and that said grand jurors so acting did thereby as the agents and officers of the State of North Carolina deny your petitioners the due and equal protection of the laws of the said State.

Second. The court erred in not finding as a fact and holding as its judgment that the judge of the superior court of Guilford county in said State at the June term thereof 1901 and on the 5th day of said month and as the agent and officer of the State of North Carolina in accepting and allowing to be filed in said court said indictment descriminated against and denied to your said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of said State of North Carolina.

76 Third. The court erred in not finding and holding as its judgment in said cause that the judge of the superior court of Guilford county as the agent of said State of North Carolina denied J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of *te* the laws of said State in "not instructing the petit jury empaneled to and before whom they were tried that they were by the law presumed innocent and which presumption attended them until overcome by positive evidence of guilt.

Fourth. The court erred in not finding and holding as its judgment that the judge of said Guilford superior court had no jurisdiction of the subject-matter of said indictment, or of the persons of J. L. Howard, A. L. Daley or H. D. Hawley or the jurisdictio*tion*, right or power to enter against them judgment in the words, as follows:

Judgem-nt of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that A. L. Daley, alias Gonez Bono be imprisoned in the State penitentiary for the term of seven years; and that its jud-ment so entered was a denial to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina in violation of the 14th amendment of the Constitution of the United States and hence void.

Fifth. The court erred in not finding as a fact and holding as its judgment that "a conspiracy to cheat and defraud" was and is not an offence known to the law of North Carolina statutory or other or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford superior court and its affirmance by the supreme court of North Carolina was not due process of law and the detention and confinement of J. L. Howard, A. L. Daley and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard,
77 A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof and void under the laws thereof and in contravention of the 14th amendment to the Constitution of the United States; and not discharging J. L. Howard, A. L. Daley and H. D. Hawley from confinement and detention *of* in the penitentiary of North Carolina and from the custody of Capt. J. M. Fleming warden thereof.

Sixth. For that the court erred in not discharging petitioners J. L. Howard, alias Frank Thompson; A. L. Daly alias Gonez Bono and H. D. Hawley on their petition; return of respondent Capt. J. M. Fleming, warden of penitentiary of North Carolina to the writ of *habeas corpus* issued thereon; replication of said petitioner thereto and the proofs in support thereof adduced and submitted at the hearing thereof before said court.

Seventh. For that the court erred in dismissing petitioners' petition for the writ of *habeas corpus* and remanding them and each of them to the custody of Capt. J. M. Fleming, warden of the penitentiary of North Carolina on the record made and urged before said court at the final hearing and submission of said cause.

Eighth. Because the judgment of said court herein is against the law on the record and facts in said cause.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Appellants.

[Endorsed:] No. 467 civil. Assignment of errors.

78 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. HAWLEY
vs.
Capt. J. M. FLEMING, Warden of the Prison of North Carolina.

Assignment of Errors.

And now comes the above-named petitioners J. L. Howard, alias Frank Thompson A. L. Daley, alias Gonoz Bono and H. D. Hawley by W. P. Bynum Jr. and L. A. Gilmore their counsel, said J. L. Howard, A. L. Daley and H. D. Hawley being about *the* pray this court for an appeal from said court to the United States Supreme Court; and assigns the following errors in the above cause, in and from and upon the judgment of said circuit court of the United States for the eastern district of North Carolina.

First. The court erred in not finding from the record and proofs in said cause that the grand jury drawn, and empaneled at the June term of the Guilford county superior court of North Carolina was an illegal body, whose acts were wholly void; and that the indictment returned by such grand jury on the 5th day of June 1901 in said superior court was void; and said grand jurors so acting did thereby as the agents and officers of the State of North Carolina deny your petitioners the due and equal protection of the said State.

Second. The court erred in not finding as a fact and holding as its judgment that the judge of the superior court of Guilford county in said State at the June term thereof 1901 and on the 5th day of said month and as the agent and officer of the State of North Carolina in accepting and allowing to be filed in said court said indictment discriminated against and denied to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of said State of North Carolina.

79 Third. The court erred in not finding and holding as its judgment in said cause that the judge of the superior court of Guilford county as the agent of said State of North Carolina denied J. L. Howard A. L. Daley and H. D. Hawley the equal protection of the laws of said State in "not instructing the petit jury empaneled to and before whom they were tried that they were by the law presumed innocent and which presumption attended them until overcome by positive evidence of guilt."

Fourth. The court erred in not finding and holding as its judgment that the judge of said Guilford superior court had no jurisdiction of the subject-matter of said indictment, or of the persons of J. L. Howard A. L. Daley or H. D. Hawley or the jurisdiction, right or power to enter against them judgment in the words as follows:

Judgment of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that A. L. Daley, alias Gonoz Bono be imprisoned in the State penitentiary for the term of seven years; and that its judgment so entered was a denial to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina in violation of the 14th amendment of the Constitution of the United States and hence void in this:

1st. That said punishment was different and more severe in kind, and different and more severe in degree that has ever been meted out by the cours*t* of said State to its own citizens or residents for offenses similar to that attempted to be described in said indictment.

2nd. That said punishment is not authorized by the statutory law of said State to be inflicted on the citizens thereof.

3rd. That said punishment is cruel and unusual within
80 the meaning of the prohibitory laws of the North Carolina constitution as interpreted by the courts of said State, and applied by said courts to the citizens of said State; and is hence a discrimination against these appel-ants, citizens of the United States.

4th. That said punishment is "cruel and unusual" as that phrase is used in the 8th amendment to the Constitution of the United —.

Fifth. The court erred in not finding as a fact and holding as its judgment that "conspiracy to cheat and defraud" was and is not an offense known to the law of North Carolina statutory or other or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford superior court and its affirmance by the supreme court of North Carolina was not due process of law and the detention and confinement of J. L. Howard, A. L. Daley and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof and void under the laws thereof and in contravention of the 14th amendment to the Constitution of the United States and in not discharging J. L. Howard, A. L. Daley, and H. D. Hawley from confinement and detention in the penitentiary of North Carolina and from the custody of Capt. J. M. Fleming, warden thereof.

Sixth. For that the court erred in not discharging petitioners J. L. Howard alias Frank Thompson; A. L. Daley alias Gonez Bono and H. D. Hawley on their petition; return of respondent Capt. J. M. Fleming, warden of penitentiary of North Carolina to the writ of *habeas corpus* issued thereon; replication of said petitioner thereto and the proofs in support thereof adduced and submitted at the hearing thereof before said court.

Seventh. For that the court erred in dismissing petitioners' petition for the writ of *habeas corpus* and remanding them and each of them to the custody of Capt. J. M. Fleming, warden of the penitentiary of North Carolina on the record made and urged before
81 said court at the final hearing and submission of said cause.

Eighth. Because the judgment of said court herein is against the law on the record and facts in said cause.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Appellants.

The above assignments of error may go up as a part of the record on appeal.

T. B. WOMACK,
Atto. for D'f't.

82 In the United States Circuit — for the Eastern District of North Carolina, at Raleigh.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. Hawley
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

J. L. Howard, A. L. Daley and H. D. Hawley each for himself being first duly sworn each for himself hereby deposes and says that they are confined in the penitentiary of the State of North Carolina at the city of Raleigh on a judgment entered against them by the superior court of North Carolina from the fifth judicial district at the county of Guilford in said State and affirmed by the supreme court of said State in the words and figures as follows that is to say:

Judgment of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for a term of ten (10) years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten (10) years.

Judgment of the court that A. L. Daley alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven (7) years.

That the said judgment so entered against affiants by said superior court of Guilford county and affirmed by said State supreme court is void because neither of said courts had power or jurisdiction to enter or affirm the same and that your petitioners are now wrongfully imprisoned and held in the penitentiary of the State of North Carolina wrongfully and unlawfully thereunder.

That affiants have heretofore to wit on the 18th day of December 1901 filed in this court their petition for *habeas corpus* setting up as grounds therein that said Guilford superior court had so entered said judgment against them without the power and jurisdiction so
83 to do in this that the grand jury returning the bill of indictment into said Guilford superior court to the June term thereof 1901 was illegally drawn, summoned and empaneled and was an illegal body whose acts were void and that the bill so returned was void and insufficient to give to said Guilford superior court power and jurisdiction to put affiants to answer and trial on said indictment wherein affiants were charged by the State of North Carolina with the offence of "conspiracy;" nor to enter judgment therein against affiants as above set forth; and that *that* said judgment so entered was against the laws of the State of North Carolina because there was nor is any law in said State statutory or other authorizing such charge against affiants and no law in said State authorizing said judgment *a* and sentence against them or either of them and that the same was whol-y void.

Affiants further say that they are poor persons and that they and

each of them have not any money or property whatever in possessio- or available wherewith to pay the expences and costs of this proceeding in this court or the costs and expences in the appeal thereof in the United States Supreme Court; but that they are informed and believe that they are so wrongfully imprisoned and restrained of their liberty in said penitentiary of the State of North Carolina and that they have a good and meritorious cause stated in their petition for *habeas corpus* in this court and that they are justly aggrieved by the judgment of this honorable court remanding them to the custody of the warden of the penitentiary of North Carolina; and that they have prayed an appeal from the judgment of this honorable court to the United States Supreme Court in good faith and because of their unlawful detention in said penitentiary as aforesaid.

Wherefore affiants pray the order of this honorable court allowing affiants leave to proceed further in their said cause in this court and to appeal the same in the United States Supreme Court as poor persons and without advancing costs in that behalf.

J. L. HOWARD.
A. L. DALY.
H. D. HAWLEY.

84 Subscribed and *and* sworn to before me this 30th day of December, A. D., 1901.

[Seal of J. M. Broughton, Notary Public, Raleigh, N. C.]

J. M. BROUGHTON,
Notary Public.

[Endorsed:] No. 467 civil. Joint affidavit of petitioners. Filed Dec. 30, 1901.

85 UNITED STATES OF AMERICA, }
Eastern District of North Carolina. }

In the Circuit Court.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley
v.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

Upon considering the petition and affidavits of the above petitioners, under chapter 209, 27 Stat. at Large;

It is ordered that the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley, be allowed to prosecute their appeal and prosecute their appeal in the above-entitled action without prepaying fees and costs or without giving security therefor:

It is further ordered that the officers of court issue, serve all process and perform all duties in this behalf.

THOS. R. PURNELL,
U. S. Judge, &c.

86 Circuit Court of the United States for Eastern District of North Carolina.

In re J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina, Respondent.
} Proceedings in *Habeas Corpus.*

It is hereby stipulated by and between the parties to the above-entitled cause that the clerk of said court may transmit the original transcript in said cause to the clerk of the Supreme Court of the United States instead and in lieu of a copy thereof.

Witness our hands and seals this 11th day of January A. D. 1902.

J. L. HOWARD,
A. L. DALEY, AND
H. D. HAWLEY,
By their attorney-, BYNUM & BYNUM.
ROB'T D. GILMER,
Attorney General of North Carolina,
By T. B. WOMACK.
T. B. WOMACK,
Attorney for State of N. C.

[Endorsed:] Stip. as to transcript.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Capt. J. M. Fleming, warden of State's prison of North Carolina, and T. B. Womack and J. L. Brooks, attorneys general of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court at Washington D. C. within thirty days from the date hereof, pursuant to a plea filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina wherein J. L. Howard, alias Frank Thompson A. L. Daley alias Gonez Bono and H. D. Hawley are plaintiffs in error, and Capt. J. M. Fleming, warden of State's prison of North Carolina is defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error by the circuit court of the United States for the eastern district of North Carolina from which said plaintiffs in error were by said circuit court allowed an appeal to said United States Supreme Court, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court this 6 day of February in the year of our Lord one thousand nine hundred and two.

THOS. R. PURNELL,
U. S. Judge, &c.

We the undersigned Capt. J. M. Fleming, warden of State's prison of North Carolina, and T. B. Womack and J. L. Brooks attorneys general of said State hereby accept service of above citation this 6 day of February A. D. 1902.

JNO. M. FLEMING,
Warden of State's Prison of N. C.
T. B. WOMACK,
——— ———,
Attorneys General of N. C.

[Endorsed:] Citation.

88 UNITED STATES OF AMERICA,
Eastern District of North Carolina.

In the Circuit Court.

In re J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
v.
Capt. J. M. FLEMING, Warden of the State's Prison of North Carolina, Respondent.

It appearing by stipulation of counsel filed as a part of the record herein, representing all parties to the above-entitled cause, that all papers, documents and exhibits filed with the clerk of this court, as constituting the original record in said cause, may be transmitted to the Supreme Court of the United States in lieu of a transcript or copy thereof;

It is ordered that the clerk of this court may in conformity to such agreement, filed herein, send all papers, documents and exhibits, on file as aforesaid to the Supreme Court of the United States, as constituting the said cause on appeal in lieu of a copy thereof.

Feb. 6th, 1902.

THOS. R. PURNELL,
U. S. Judge, &c.

89 UNITED STATES OF AMERICA,
Eastern District of North Carolina.

In the U. S. Circuit Court.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ Bono, and H. D. Hawley
v.
Capt. J. M. FLEMING, Warden State's Prison of North Carolina.

I, N. J. Riddick, clerk of the U. S. circuit court for the eastern district of North Carolina, in pursuance of the stipulation of counsel representing the plaintiff in error and counsel representing the defendant in error, and the order of the presiding judge, both of which are sent up as a part of the record herein, *I* do hereby certify the attached record, in lieu of a transcript thereof as embracing and

constituting the said cause on appeal to the Supreme Court of the United States.

I do further certify it was agreed by counsel aforesaid that all papers, documents and exhibits above transmitted shall embrace the said cause on appeal.

Witness my hand and official seal, this 4th day of March, 1902.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, Eastern Dist. of North Carolina.

O K.
T. B. W.

90 [Endorsed:] No. 467 civil J. L. Howard *et al.* plff's in error *vs.* J. M. Fleming, warden &c. def't in error Copy of record sent up under stipulation of counsel & order of court.

91 EXHIBIT A OF THE RESPONDENT'S RETURN.

In the Supreme Court, State of North Carolina, October Term, A. D. 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Statement of Case on Appeal to the Supreme Court.

L. A. Gilmore, Bynum & Bynum, John A. Barringer, attorneys for defendants.

92 Superior Court, State of North Carolina, Guilford County, June Term, A. D. 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Statement of Case on Appeal to the Supreme Court.

This was a criminal cause originating in said court upon indictment duly returned, a true bill by the grand jurors of said county, to the June term, 1901, of said court, and tried at that term before counsel judge and a jury, which indictment is in the words following, that is to say:

"STATE OF NORTH CAROLINA,
Guilford County.

Superior Court, June Term, A. D. 1901.

Indictment—First Count.

"The jurors for the State, upon their oath present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, with force and arms at and in the county
93 aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devices, to obtain from one Paul Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

Second Count.

"Second count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, being persons of fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make an assault and him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley had been mutually agreed and undertaken to do; to the
94 evil example of all good citizens and against the peace and dignity of the State.

Third Count.

"Third count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property, did on the 20th day of March, A. D. 1901, in the county of Guilford, aforesaid, feloniously, wickedly

and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit:—By him, the said J. L. Howard, alias Frank Thompson, pursuant to a conspiracy, confederation and agreement theretofore had and made between him and his co-conspirators above named, falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson, and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona, which said gold was held by the said Gonez Bono on Buffalo creek, near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him; and the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine, and of the value of many thousands of
95 dollars which they offered to demonstrate by a chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of their common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley. And the said J. L. Howard, alias Frank Thompson, then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal falsely and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal, by means of which said false, fraudulent and felonious representations, the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided, and against the peace and dignity of the State.

(Signed) "BROOKS, *Solicitor.*

Returned true bill. This indictment was regularly endorsed and returned "a true bill" by the foreman of the grand jury.

That on the fifth day of June, 1901, being the second day of the said term in said court, said defendants by

Counsel in case. their counsel L. A. Gilmore, Bynum & Bynum and John Barringer, called upon A. L. Brooks,

Motion for bill of particulars. 96 solicitor for the State, for a bill of particulars in said cause and as to each count of said indictment, and were by him

informed in open court that he could give no further particulars than appeared in the several counts of the indictment; whereupon the defendants moved the court for a rule on the State solicitor, A L. Brooks, for a bill of particulars, and for the granting of such motion specified that said defendants, through their solicitors had theretofore called upon A. L. Brooks, solicitor for the State, for a bill of particulars with respect to the first, second and third counts of said indictment; and because the said indictment and each count thereof are insufficient in this; that the first count thereof does not inform the defendants of the nature and cause of the accusation against them; that the certain pretenses, subtle means and devices are not therein set out and described; nor the cheat nor fraud described, nor the amount of the money intended to be obtained or that it was good and lawful money of the United States, nor of any value in good and lawful money of the United States; nor what the goods and chattels were or that they were of any value; that second count thereof does not inform the defendants of the nature and cause of the accusation against them nor state nor show sufficient facts as means or ends to constitute a crime; and that third count thereof does not inform the defendants of the nature and cause of the accusation against them nor what the intended cheat or fraud was nor the amount of the money so intended to be obtained or that it was good and lawful money of the United States or of any value as money of the United States; nor what the goods, chattels or property were nor the amount thereof or that they were of any value; nor state nor show sufficient facts as means or end to constitute a crime.

97 Because said indictment and each count thereof are otherwise informal and so general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution.

Motion for bill of particulars denied.

1st ex. That said motion of the defendants was overruled by the court; to which ruling by the court defendants by their counsel then and there duly excepted.

That thereupon the defendants by their said counsel moved the court to quash said indictment and each count thereof by their motion in writing entitled in said cause and court, the body of which is in the words and figures following, to wit:

Motion to quash indictment.

"Now comes the defendants J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, in their own proper persons and by L. A. Gilmore, Bynum & Bynum, and John Barringer, their attorneys, and move the court to quash the bill of indictment returned against the said defendants and each and every count therein and for grounds therefor urge the following:

"First. For that the allegations in the said bill of indictment and in each and every count thereof do not constitute a crime under the ordinance of conspirators made and accorded by King Edward the First and his council in the 33rd

Grounds of said motion.

year of his reign, A. D. 1305, nor by any statutes in England since that date nor under any common law in force in the State of North Carolina at the date of said alleged offense.

"Second. Because the allegations in said bill of indictment and in each and every count thereof do not constitute a crime under the statutes of the State of North Carolina in force at the date of said alleged offense.

98 "Third. Because the common law with respect to conspiracies has been abrogated in the State of North Carolina by its constitution and legislative enactments upon the subject of conspiracy, to wit, the acts of 1868 and 1879, Code 1883, sections 974 and 1107, by neither of which said acts is the crime charged cognizable.

Motion to quash.

"Fourth. Because the alleged warrant upon which the defendants were arrested and held for their appearance at the June term of said court and the indictment against them do not constitute due process of law within the meaning of the 14th amendment of the Constitution of the United States.

"Fifth. Because the alleged crime sought to be charged against them in said indictment is not cognizable or punishable either under the common law nor under the statute of the State of North Carolina.

"Sixth. Because there is no statute of the State of North Carolina authorizing the said indictment, and the same is invalid and unconstitutional because it does not inform the defendants of the nature and cause of the accusation against them.

"Seventh. Because there being no statute of the State of North Carolina nor common law in force in said State authorizing said indictment nor denouncing a punishment for said alleged crime the same is contrary to the 14th amendment of the United States Constitution, in this that it is not due process of law; it denies defendants equal protection of the laws; it abridges the privileges and immunities of the defendants as citizens of the United States, said defendants being citizens thereof.

"Eighth. Because the said indictment and each count thereof are insufficient in this; that the first count thereof does not in-

99 form the defendants of the nature and cause of the accusation against them; that the certain pretense, subtle means and devices are not therein set out and described; nor the cheat nor fraud described nor the amount of the money intended to be obtained or that it was good and lawful money of the United States nor of any value in good and lawful money of the United States; nor what the goods and chattels were or that they were of any value; that second count thereof does not inform the defendants of the nature and cause of the accusations against them nor state nor show sufficient facts as means or end to constitute a crime; and that third count thereof does not inform the defendants of the nature and cause of the accusation against them nor what the intended cheat and fraud was nor the amount of the money so intended to be obtained or that it was good and lawful money of the United States or of any value as money of the United States; nor what the goods, chattels or property

were nor the amount thereof or that they were of any value; nor state nor show sufficient facts as means or end to constitute a crime.

"Tenth. Because the said indictment and each count thereof are otherwise informal and so general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution."

Motion denied 2nd exception.

2nd ex. Which motion was overruled by the court, to which ruling of the court the defendants then and there excepted.

That thereupon the defendants and each of them pleaded not guilty to said indictment and to each count thereof.

That thereupon said cause was called for trial. Present A. L. Brooks, solicitor, assisted by Messrs. King and Kimball, attorneys for Paul Garrett; L.

Case called.

Motion to separate witnesses.

100 A. Gilmore, Bynum & Bynum and John Barringer, for defendants. And while the regular panel of jurors was in the court-room the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled and during the trial of said cause. The solicitor objecting, said that the witness Paul Garrett would be the first witness examined and the others would testify as to matters not in his knowledge, except the detection in Greensboro.

Whereupon the court remarked that it was a matter of discretion with the court, and that all the witnesses except the complaining witness, Mr. Garrett, and the high sheriff of the county, might be excluded from the court; but as to these witnesses their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other.

3rd exception to remarks of court.

3rd ex. To which remarks of the court, the defendants, through their counsel then and there excepted.

That on Friday, June 7th, 1901, being one of the days of said term of the court, the State to prove its case produced and had sworn one, PAUL GARRETT, whose testimony so given, tended to prove in substance as follows:

Paul Garrett. Direct exam.

"My name is Paul Garrett; I live in Weldon, North Carolina. Saw the defendant, J. L. Howard, alias Frank Thompson, Wednesday morning, March 20th, 1901, about nine o'clock a. m. at my office in Weldon, N. C."

And was then asked by the said solicitor this question: "Q. Now you may go ahead in your own way and state to his honor and the jury the circumstances under which he came there, and what occurred between you?"

Objection as to venue.

101 To which question the defendants by their counsel, objected on the ground that the indictment alleged the offense charged therein and its venue as having been committed in Guilford county, and that the court would take judicial notice that Weldon was in Halifax county; and that

being so no acts or declarations by any one or more of the defendants occurring in any county other than Guilford were competent, relevant and material; and this because it related to another jurisdiction than the one alleged in the indictment, where the defendants might be prosecuted.

4th exc. 4th ex. Which objection was overruled by the court, defendants then and there by their counsel duly excepted.

The solicitor then announced to the court that he proposed to prove by witness certain declarations and acts that are to be afterwards so connected as to be evidence before the jury, of the conspiracy among the defendants now on trial; that if such acts and declarations of the defendant Howard are not so connected, then such will not be asked as evidence against the other defendants.

To which proffer by the State, defendants by their counsel objected, as same is not sufficient to authorize the testimony of certain acts and declarations of the defendant Thompson in a county other than Guilford and in the absence of the other defendants.

5th exc. 5th ex. Which objection was overruled by the court, with direction to witness to proceed; to which ruling of the court defendants, by their counsel, then and there duly excepted.

On the morning in question, as I before stated, I was dictating my correspondence to my stenographer. The door to the room was opened and a man appeared there. He was in the garb of a miner, or a laboring man of the better class. He asked if Mr. Gar-
102 rett was in. I replied that he was and asked what he wanted. He stated that he wished to have a private interview. I replied that I was busy at that time and that he would have to have a seat in the outer office. I finished the letter on which I was engaged and went into the next room and asked the gentleman what it was he wished. There was another clerk present, and he, looking over at him, said that he wished to see me privately. I stated that any business matter could be discussed in the presence of this clerk. He stated that he must see me entirely alone. So instead of stopping the clerk and sending him out, I went on the outside with him. Arriving at the outside he asked me if I had a brother named Andrew Garrett. I told him no, that I had no brother, that I never had but one and he died in infancy. He said that he was mighty sorry, that he was looking for Andrew Garrett's brother; that he was from Arizona; that Andrew Garrett was his partner there a number of years before, and that Andrew had come East in response to an invitation from an aunt of his, who lived in Charlottesville, Va., to take charge of her affairs; that she was quite a wealthy woman, and he had come to take charge of her affairs; that they had an understanding when he left, which was four years before, that any time either of them got anything good, they would acquaint the other with the fact. That in the meantime he had "struck it rich," and in company with an Indian chief—I think he said an Indian chief—he had come East to look for Andrew and to buy machinery for this mine. I cut him rather short; told him that, unfortunately, I was

neither Andrew nor Andrew's brother, and I did not see how I could serve him at all. He said it appeared to him like nobody wanted to talk to him; that everybody seemed to think he wanted to
103 get some money out of them. He pulled out his purse and exhibited quite a roll of money. I told him that I did not see where it interested me at all, that I was not Andrew's brother. Well he said they were in search of Andrew's brother, and they were coming along East, the Indian, whose name was Gonez Bono, had eaten a lot of trash on the train, candy and peanuts, etc., and had gotten sick, and at Greensboro he refused to go any further, and he had taken him off the train here and carried him out in the woods; that the Indian would not stay in the house, he had to have a camp in the woods. That he had gone on through Greensboro to Charlottesville, looking for Andrew, but when he got to Charlottesville he found that Andrew had died; that his aunt had moved to Washington city, and that he had asked of that family in Charlottesville, and he was told that at Weldon there was a man named P. Garrett; that he knew that Andrew had a brother named Peter Garrett, and he thought this might be the man; and he was mighty sorry I was not Andrew's brother. I told him that inasmuch as such good things were in view I was sorry myself that I was not Andrew's brother, but I didn't see how I could help it. I was not; that my name was Paul instead of Peter. We exchanged condolences on the death of Andrew and the absence of his brother, and the result of it was he said he had been making some inquiries about me before he got there, and found that I was pretty good at figures and an honest man, and that he was looking for such a man to look after the business of their affairs, that he was a very ignorant man, could not read nor write, nor make figures, and that they wanted some good reliable man to take charge of their business interests; that they had with them two bars of gold (he may have said chunks), two pieces of gold; and they were on their way to Philadelphia mint to sell the
104 same, and the proceeds of which were to be invested in mining machinery, outfit, etc. The conversation proceeded along those lines,—a good deal of repetition in it, and as confirming his statement about the circumstances, he gave me some incidents in his life of his trip East. That at Albuquerque, New Mexico, at which point I think he said he took the train to come East, he had met up with some character in that country whose business it was to keep an eye on every new mine that was started and cheat them out of their claims, and this fellow had tried to pump him out of his information, but he had been very discreet and had not said anything about the discovery of this gold mine; in confirmation of it he drew this from his pocket. It is an envelope purporting to be from a hotel in Minnesota; there was no address on it, but he had a clipping, which purports to be an extract from some newspaper. He handed it to me and asked me to read it to him. He said some fellow had read it to him, but he was not sure it was read right.

Which paper in substance was that, Frank Thompson and an Indian chief, named Gonez Bono, were on their way to Philadelphia to dispose of the product of a certain gold mine in Arizona, and

that they were very careful in not disclosing its location, or saying much in particular about it for fear that some one would discover its location and take it from them before they had filed their claim thereon.

That the defendant Thompson then said that the Indian, Gonez Bono, stopping at Greensboro, was the same that accompanied him there. That after exhibiting these pieces of paper and some other conversation along the same line, he also exhibited a little bag and began shaking it, and in it were specimens of ore and a little
105 gold bar, about, I suppose, three and a half or four (3½ or 4″) inches long, and one and a half (1½″) inches wide, one-tenth or one-eighth ($\frac{1}{10}$ or $\frac{1}{8}$″) of an inch thick. I think I could identify it, and it is among the effects. He showed them to me, and I handled them and handed them back, and still intimated that I did not see exactly what connection I had with the case, but that it was all mighty pretty and nice; and he then went on and said that as Andrew was dead and he could not find his brother, he didn't see why I couldn't look after it for him. He said they wanted a man to take charge of it for them, and would give him a third interest in it. I then went on to question him about the mine, how they had been working it. He said they had never had any machinery, excepting Indian squaws had "toted" part of the ore on their backs. They had gotten up this much gold in two years, and that there was a big thing in it for whoever would take hold of it and work it right. I told him that I had already taken great interest in gold-mining; had worked in a gold mine a short while, had familiarized myself with it, and had a little experience with gold-mining myself. He explained then the situation of the country, its location in the mountains, it was several miles, I think about 40 miles from —. The conversation drifted along these lines. Finally he wanted to know what I thought of it, and I told him that if there was anything in it I didn't know that I would object to take up a proposition. I asked him what would be expected of me. He said the first thing he wanted me to do was to go along with them to Philadelphia, and sell it to the mint. That they needed somebody that could figure and I said that I had no objection to going; that I was up for business. He said that, too, I would be expected to go with them by Washington city and file the
106 claim; that the claim had never been filed; that is was in the Indian reservation. "Well," I said, "that is going to require a good deal of time and absence from home, and I generally get pay for my services." Well he said they would give me one-third interest in the two gold bars. And I asked him what that would be. He said they would weigh about one hundred and fifty (150) pounds. Didn't know exactly; that somebody had weighed them for them. He seemed to be very suspicious of everybody. I asked him what it was worth. "Well, dat Jew at Albuquerque had bought ten (10 lbs.) pounds of it, and he give me twelve $20 gold pieces for dat much." He said there were one hundred and fifty pounds of it, about $36,000, and that he would give me one-third of it. I asked him what the mining outfit was going to cost, and he enu-

merated; and I figured that the mining outfit would cost $20,000 and there would be a balance left of $16,000, of which I was to have one-third. He asked me what my part would be. I told him it would be something like $5,000. He said he reckoned we could have a good time in Philadelphia on that after paying our expenses. I told him yes it might serve for a short trip. "But," said I, "I don't know anything about these gold bars. I want to see something beside that. If I leave my business, I will have to get somebody here to look after it for me." He wanted to know what I wanted for my services. I told him it was hard to place an estimate on my services, but I would not make a charge less than $25 a day to recompense me for my absence from my business and my expenses. He said he thought I put a pretty good value on my services. I told him I did. He said, well he didn't mind paying a good man,
for he wanted a good man, he wanted an honest man, and
107 that they told him I was honest; that he had met a man on
the train, and had inquired about me downtown, and he consented then to it, so far as he was concerned; said he would not mind if the Indian would not mind; he would have to see the Indian about it before he could consummate it. Wanted to know if I would not go back with him and see the Indian that afternoon. I told him that I had an engagement in Norfolk tomorrow, that I could not go this afternoon. I can't remember now, there were quite a number of questions passed. I said, "You go on to Greensboro. I will go to Norfolk. You want to go to Philadelphia. I I can go right over to Philadelphia, and get this matter transacted. I will make my arrangements to leave home." He said the Indian was mighty curious and mighty suspicious, and he was afraid he would not get him off. In fact he didn't have but twenty days' leave of absence from Col. Crook, and they had been off twelve days, and the Indian was getting restless and wanted to go back anyhow. I told him I did not know how I could help him then, that I could not break my engagement at Norfolk. He asked me if I could come to Greensboro. "Certainly," I said, "I can, but if you want to go to Philadelphia come by Norfolk, and I will go with you on these terms." Well, he said maybe we might arrange to do it, but he didn't know what he would do with the Indian. Then he asked me if I would not agree to go on Friday. But in the meantime he had gone on a good deal about the vast resources of this mine. It was plausible in one view and it was not plausible in another. It was mighty pretty. I told him then that if the Indian was willing and he would let me know at Norfolk, I would come back. He said they didn't have any time to lose. I said, "You can telegraph me at
Norfolk tomorrow." He wanted to know what a telegram was.
108 I said, "You write the message to me and carry it to the telegraph office and then send it to me." He wanted to know how that was, if they stuck it on the wires and they sent it to me. I explained. He seemed to be very much enlightened as to what a telegram was, and said that would work all right. But how was he going to manage it? He didn't want to take anybody else into his confidence. I said, "I will write out a telegram here and if the In-

dian is willing you can send it to me." He said that would be a good idea. So we then went into my office. All this conversation took place on the outside. The young man was still sitting there, and I took down a telegraph blank and wrote it. "Now," I said, "if Gonez is willing to this proposition, you will send this telegram." The telegram read, "Gonez willing; come at once; will meet at train." I signed it, at his suggestion, "Frank Thompson." "Now," he says, "Suppose the Indian is not willing?" I said, "Well, I will write another one." And I really cannot recall that one, but it was to the effect that Gonez refused to agree. I wrote the telegram and he said, "I can't tell one from the other." "Well," I said, "I will put a cross-mark in blue pencil on the one that means "yes;" on the other, not to come, I will put a round mark." And I made him repeat it. "You say you are going to pay my expenses?" He pulled out his purse and handed me a $10 bill. I looked at it pretty closely and put it in my pocket. We talked a little while on that line, and he asked me about the trains—when one went back. I told him shortly after noon. I told him I would meet him at the train. He went out and had to go round the corner of the house, and go back right in full view of my office, which has three compartments. The front office is occupied by two young men, and the rear offices, one of them is occupied by myself
109 and another young man, who hears everything that goes on of a business matter; and the one at the rear or at the farther angle is occupied by the stenographer, and I dictate my letters in that office generally. I walked into the office as he turned the corner, and I touched the two young men on the shoulder. I didn't want the stenographer to hear. I said, "If you want to see a genuine gold-brick man, look out the window quick." They both ran to the window. I said, "If he is not one, I never saw one." I rang the 'phone and called up the revenue officer at Littleton, N. C., whom I know personally, and under the suspicion that the bill I had from Howard was a counterfeit bill, I told him I would like to have him come down that afternoon on the next train, I wanted to see him on a matter of importance. Thompson was crossing the bridge then. He answered and said that he would be down on the next train. I went on and finished what correspondence I could, and about the noon hour, as usual, I went to town. I took with me the deposits for the day. I went to the bank at once and made my deposit, and went back into the cashier's private office and told him that I had a big proposition, that I was about to go into the gold-mine business. We had a conversation on the merits of the case. I went over the situation with him.

Q. Mr. Garrett, when was it that you began to suspect him? That there was something wrong about it?

A. The real suspicion began when he made reference to the Indian being out in the woods.

Here defendants by their counsel objected to the witness relating any further of the conversation then or subsequently occurring between him and the defendant Thompson with respect to the gold mine or its supposed product or the Indian in the woods, etc.

110 6th ex. Which motion was overruled by the court, and the witness directed to proceed; to which ruling of the court the defendants then and there duly excepted.

Witness proceeds: I have omitted just one item in answer as to what my services would be. I explained to him that inasmuch as the claim was all right, I could not leave my present business to take charge of the mine in Arizona. It was agreed between us then that if it would be agreeable to the other parties, that we would employ a time-keeper, book-keeper and general manager, to be paid from out of the expenses of the mine.

Q. Was there any consideration or suggestion made as to what part?

A. One-third interest.

Q. It was agreed that you were to employ a book-keeper?

A. Yes, sir. He was to work on a salary. Another point I will bring in right here. While writing these telegrams, there was an electric light over my desk of a little peculiar pattern, and he got down and looked at it and said, "What might that be?" I told him that was an electric light. He said, "What's that?" I told him, "It gives light here at night." He said, "How do you light it? Do you stick a match to it?" I told him no, that I turned a little peg and it lit up, and I turned another one and it went out. He said a boy down at the hotel showed him. He wanted to know if I could explain it. I told him no, that I was not sufficiently an electrician to explain it. I told him at home I would see him at the train. I went to the bank and talked with the cashier, and told him to go down to the depot and stand around and observe the man that I was talking to. When I went up he was buying his
111 ticket. I stood on the outside and as soon as he saw me he came and engaged in conversation again. He said the ticket cost so much and he gave him a bill for so much and asked me if he gave him the right change. I counted his money and told him his change was correct. I asked him what hotel he stopped at. He said the tavern right there. He said he had to get the tavern-keeper to write his name on the book, he didn't know what that was for. I told him that was customary. He wanted to know if he didn't charge him too much for his lodging. I told him no that was the regular charge. He said, "He asked me if I was a commercial man, I believe." I said, "What did you tell him?" "I said I didn't know what that was." I told him they gave drummers a special rate, "if you had told them you were a commercial man, I guess that would have been all right." And the conversation drifted along these lines. He then had me read this paper to him again, and he went over again the question of the cost of the mining outfit. And according to the understanding there I took out a letter which I had in my pocket, and on the back of it had him give me the cost of the mining outfit.

(Letter marked Exhibit "A" introduced, was a pencil memorandum by the witness of mining machinery, consisting of engines,

boilers, derricks, wagons, plows, picks, horses, harness, etc., of the aggregate value of twenty thousand ($20,000) dollars.)

He then asked me if that was not pretty good pay for my services. I told him yes. I began to question him further about the mine. He intimated in this conversation that the output of the mine would assay, with the machinery that we proposed to buy, a million dollars a year apiece. I then asked him about the general conditions
112 of the country, health, water, atmospheric conditions, nice country to live in; if there was any hunting and fishing. He said he was not fond of hunting, but that he hunted sometimes to get game for the camp, could shoot with a rifle, but never could shoot with a pistol. I asked him if he ever carried any weapons with him. He said no, that when they came to take the train they brought along the rifles in the wagon, but they sent the rifles back; that he was not a good shot with a pistol. I replied that I was a very poor hand also. We discussed other matters. While we were talking the cashier of the bank came forward, and I had seen him standing near. The cashier walked up and remarked, "Mr. Garrett, it is about the time of day that I take my drink. Won't you and your friend come and have a drink with me?" "Mr. Smith, let me introduce you to Mr. Thompson, of Arizona," I said. Thompson declined and I declined also. We continued our conversation then, and he said coming out East was mighty tiresome, that he didn't mind it for the first day or two, but he passed El Paso, and after he left there it was a long tiresome road; that he crossed a big river. I said, "The Mississippi?" He said yes, that he thought it was. He said there was a great big city there, and he had to lay over there. He counted up the time they had been away from Arizona. He said up to that day they had been away 12 days, that the Indian's leave of absence would be out in 20 days, and the Indian was getting very restless and uneasy, and wanted to go back to the reservation; that they would imprison him if he did not get back in time, and that it might be that the Indian would be so worried out and tired that we would just have to buy the Indian out and let him go back home. I asked him what he thought he would
113 take. Thought the Indian's share would be about $12,000.00. He then said that the Indian was mighty suspicious anyhow, and that at New Orleans they had run up against a man there; the fellow come up to him looking real nice; said he had on a white shirt, stiff collar, a great big diamond in cravat; said he was walking up and down the platform, and this fellow came up and spoke to him, and asked him where he was going. He told him he was going to Charlottesville, Va. He asked him if he knew anybody in Charlottesville. He told him no, that he was looking for a man named Andrew Garrett. He said, "Why I live in Charlottesville, and know him very well." They got to talking, and he said after talking a little with the fellow he told him he was in mighty hard luck, and that he and his brother, who had consumption, had, I think, started from Colorado to Arizona for his brother's health, but his brother died on the way, and he was on his way back to Char-

lottesville. He said, "I am in hard luck. I have not got any money in my pocket to buy my ticket. I wish you would loan me enough money to buy my ticket, etc., and when we get on the train I will pay you back." Well, he said the fellow seemed honest, had a good face, and said that his mother had always told him to be honest.

Said his mother, after her father's death, had grieved herself to death, that she kept a little Testament, and sometimes she would read it and cry, and told him he must not tell a lie, that if he told a lie he would go to hell, and that he didn't believe that a man like that would tell him anything but the truth, and so he pulled out his roll of money and started to count it out, and said when he did Gonez commenced to shake his head. But he knew that Gonez hadn't heard him. So he counted him out $300. Said the
114 fellow was mighty nice and they got on the train. The first station they got to he left his seat, and when he came back to look for the fellow he didn't see him, but he thought he would turn up directly. After going by two or three stations, he went to the man who had the buttons on his coat, and asked him where his friend was who had the corpse on the train. He said there was no corpse on the train. He told him yes, there was, for his friend had told him so, and he knew his friend would not lie to him. The conductor told him not to talk to every stranger that he come up with and he would better divide his money into two rolls so as not to show it all at the same time. He said he followed the conductor's advice, and since that time he carried some of his money in one bag and some in another. I told him that he must be pretty unused to the ways of the world, and I thought he needed some one to look after his affairs for him. While we were standing there talking about various things, he said while he was in Charlottesville the other day he saw a woman coming down the street riding on a little seat with two wheels made out of wire. Said "How in the name of the Lord did she sit on that?" "Why," I said, "didn't you ever see a bicycle?" Said, "No, what was that?" Said he saw something else, "saw a little car on the street about half as long as a railroad car, and it had a pole on top of it, and a man standing out in front of it, and it just went along with nothing pulling it and nothing pushing it." "Why, that is an electric car" I said. And he wanted me to explain to him what electricity was. I told him that was beyond me, that I could not do it. He explained to me then in this conversation at the shed, if Gonez agreed to the bargain, that when we came to Greensboro we would go out and see Gonez, and have a talk with him, and bore into the bricks and bring
115 them back to town and have them tested, and if the tests showed up all right, and if the Indian was still uneasy, why we would just buy the Indian out, and let him go on back. He was a great deal of trouble. His time was nearly out and he doubted whether we could get through with the work in Philadelphia and get through filing the claim in Washington in time for the Indian to get back.

I agreed to the estimate that he gave me of the value of the gold

as $36,000, and the cost of the machinery, $20,000, which would leave $16,000 to be divided between the Indian, myself and himself as pin-money. He intimated that if the Indian would not go to Philadelphia we would just buy him out, and he made some inquiries as to how much money I could raise. Up to this time he made no suggestions as to what the Indian could be bought out for. He afterwards said, "We will just buy the Indian's share and let him go home. It's worth $12,000. This beaded bag is the one he showed me, and contained two or three pieces of ore and a small bar of gold. The defendant sitting in the middle with glasses is Howard, the one who showed me the bag of gold; and his appearance now is different than it was then; then he had on a flannel shirt, good and substantial, but showed evidences of use, and he had a full beard. I saw him take the train at Weldon for Greensboro, and I awaited the arrival of Mr. Lewis, the gentleman whom I had 'phoned. I simply transacted my own business affairs. After a conference with Mr. Lewis, I drove out in the country late in the afternoon, just before dark, to the house of Mr. H. A. Mims. I reached there just about dark. It was raining. I called Mr. Mims to his front gate. I engaged Mr. Mims to come to Greensboro and confer with the authorities here.

Q. Did you give Mr. Mims any letter of instruction?

116 A. After I got home. I drove back home then, and addressed this letter myself to Mr. Patterson, accompanying it with a letter, a short note of introduction to Mr. Lewis. I wrote the letter myself, I addressed this letter to Mr. Patterson. Mr. Mims reached my house at about 8.30 or a quarter to nine. I wanted him to take the nine o'clock train. I handed him the letter and told him to read it for his own intelligence, and to confer with Mr. Patterson here, and the other authorities to whom he might introduce him. On the next morning I fulfilled my engagement in Norfolk. There is now a point I omitted to state. I sent a telegram to the chief of police at Richmond, I think that night. I wrote it in the afternoon, but don't think I sent it until that night. I received the telegram in Norfolk, Va., at the Monticello hotel about night from Thompson. I have the telegram that I received. Telegram reads: "Greensboro, N. C., March 21, 1901. Paul Garrett, Norfolk, Va., care of Monticello hotel. Gonez willing; come at once; will meet all trains. Frank Thompson."

Q. One other question, Mr. Garrett. What was the arrangement between you and Mr. Howard as to how much you should receive?

A. $25 a day and my expenses, and he handed me $10 on account.

Q. In response to the telegram what did you do?

A. In response to the telegram I came to Greensboro. Reached here next day at about noon. I do not know the exact hour by schedule time. I got off the train, looked out of the window before getting off, to see who was in sight, I saw Mr. Mims walking up and down the platform. I stepped off the train and walked

117 in another direction so as not to meet him face to face. In about a moment Howard was there, and told me he had

been waiting for all trains since morning; seemed to be very disappointed because I did not come earlier. I told him I came as early as possible, that I had to come by home to leave my wife, who was in Norfolk. We walked in the waiting-room, to look around and see if anybody was about there to listen. I asked him what his program was. He said he would drive right out and see Gonez, everything was all right he thought. Gonez was sorter uneasy, but he reckoned maybe he could fix things. I said "I have got to have some dinner." He said that was all right, where did I want to go. I told him I thought I would go to the McAdoo house, I had stopped there years ago. So we walked up the street together. Going up the street I had occasion to slip my handkerchief out of my pocket, and a bit of paper flew out and blew up the street, he chased it very actively, and caught it and examined it very carefully. I said, "That is nothing but a bit of paper." He showed me that he was thoroughly on the alert. I went into the hotel and registered. I turned to him and said "You will take dinner with me?" He said no, he had had dinner. I asked the clerk the dinner hour; he said one o'clock. It was then a few minutes after twelve. I said we would sit down here for a little talk. We sat down on the right side of the desk and began discussing matters generally. Mr. Mims walked in and took his seat right near opposite. Other people passed in. I paid no attention to Mr. Mims nor he to me. And we had quite a conversation. I had him recount again the mine. He had me count his money to see whether he had been cheated on the trip back here. I said to him, "I'm glad you have got some money. I am busted. I went to Norfolk and took along $75, expecting
118 to pay my expenses and the recording of the deed. I will have to borrow some money to pay my hotel bill." He said he had a plenty to get our tickets to Philadelphia, and if we got to Philadelphia and sold our bars we would have lots of money. We discussed many matters there. Among them I asked how far the Indian was, how far the camp was from town. He said about three miles out in the woods. I said I did not know there were any woods in Greensboro sufficiently close to hide an Indian. I said I would like to know where it is, for I have been down here a good many times, and I thought the country was all cleared up for two or three miles around here. He pointed his finger right out down the railroad, a little creek down there. I did not want to press the matter too far. I thought that might be some clue as to the direction we were going. He then said, he told me this at the shed, but he repeated it more fully this time; that when we bored the brick, we would get out plenty of borings, and when it was assayed and melted down we would have a nice little piece of gold to have my wife a ring made of. I said that certainly would be nice; she would appreciate it. About this time I told him that my wife was not sure where I was going, and he explained that we could go out to the woods and bore the brick and have them assayed; he said we would come back to town and get it done at a drug store. I didn't see how a drug store was going to assay it. But this is what he said, we would go to a drug store and get it assayed, and that if everything

was all right with the Indian we would go to Philadelphia that night, but if the Indian broke up the arrangement, or anything of the sort, we would buy the Indian's share and let him go on back. And then
he began questioning me about raising some money, whether
119 I could get any money, and how much I could raise. I told him he had struck me at a mighty bad time. I told him I had just bought a large piece of property which cost in the neighborhood of $40,000. He wanted to know if I paid all cash. I told him no, that was the deed that I had recorded; I had to pay about $35 stamps, and $35 for recording. They charge $1 a thousand for recording. It took $70 I remember to complete the deed. He wanted to know if I could not raise money on that land. I told him that if the necessity arose I could raise a little money, I reckoned. The bricks had not been weighed at that time; he told me we would go out there and if the Indian was cranky, we would just buy him out. I would have to raise the money, but that I would be recompensed when I got to Philadelphia. I told him that on a push I reckoned I could raise a little money. He wanted to know how. I told him it would require some time. I would have to go to the bank and get identification. He wanted to know what banks were. I told him it was too much of a subject to go into fully. He absolutely confessed ignorance of banks. I then remarked that I had to write to my wife. I went into the writing-room and sat down at the desk, where I could keep him in view. At the McAdoo house Mr. Mims walked in. I caught a chance when Thompson was not looking at me, and asked Mims to go downstairs. There was another man in the writing-room; didn't know who it was. I handed Mims a little slip of paper, some further instructions that I had jotted down on the train. I arranged for Mr. Patterson, the revenue officer, to come to dinner with me. I finished my letter, went and bought a stamp at the cigar stand, and asked the clerk, in a tone of voice that Thompson could hear, for reassurance when the next train went to
Weldon, that I was anxious for my wife to get that letter. He
120 said while I was at dinner he would get the horse and have a buggy ready when I finished dinner. The intimation was that we would make arrangements with the Indian; there was no assurance that he would back out; but there was a strong intimation that the Indian was very restless and was going to want to go back. There was a broad hint that we would have to pay him a one-third interest, but we might get out for less. I went up to dinner. I asked him if he would take dinner. He said no, he would go and get the horse and buggy, and have it ready. Mr. Patterson and I got to the table. I asked him to look around the room and see if he knew everybody there. He said he thought we were safe. We went over the plans then; I told him what had developed, and stated to him that I wished protection. I located practically the point, just picked up the question and made further developments. I think it is proper for me to say here that Mr. Patterson left me in doubt at that time, until just before we left he gave me the assurance that he would go along. Mr. Patterson left the table before I did. I waited a little while. When I went down Mr. Mims was in

the corridor and the buggy was standing at the door, held by Thompson (as I knew him then). He was standing on the ground. I passed by Mr. Mims, and he remarked that they had gotten the papers. I loitered around the lobby a few minutes and then went out and got into the buggy. I said, "You have got no buggy robe." He said we didn't need any. I said, "March weather is very changeable; I would rather have a buggy robe, and if it will be no inconvenience I would like to have you drive up to the stable and get a buggy robe." We drove up to the stable and got tangled up in a lot of buggies, and it took some two or three minutes to
121 get out. We drove out across the railroad. Went out southwest, I believe it is. We drove along pretty nicely. I complimented him on the way he held his reins. He said he had been accustomed to driving a team of four horses, and he went again back to the question of banks, and asked me where I kept my money. I told him I didn't keep all my eggs in one basket. He said he didn't understand. I said, "Yes, you do," He said, "You mean you keep some in one bank, and some in another?" I told him that was about the size of it. "Do you keep any money in Weldon?" I said, a little. "Do you keep some in Norfolk?" I said, perhaps so. I was non-committal about the money. And again he referred to the fact that he didn't know how we would find the Indian, that when he left him that morning he seemed to be in a good humor. They were mighty suspicious, and we might find him all upset, and if so, we would just buy him out and let him go on back; he was a trouble anyhow, and in Philadelphia he didn't know what on earth he would do with him in a city. I consented to what he said. We drove along at a nice easy gait. At about two miles from town, he said we were approaching the place and we would drive a little slow. I told him that it was agreeable to me, that I was not in any hurry. We drove up right behind a wagon; I think there was a man and little boy in the wagon; they were driving in a little dog trot. We followed on for about half a mile, I think. He didn't want to pass them, they might see us. All right then, drive along behind them. Don't make any difference to me. Right at the top of the hill the wagon stopped and the man got out to get a drink of water. He stopped his horse and said, "Now I don't know what to do. If I drive on he'll see me." I said, "If you do not want to pass him, get out and get a drink of water." He got out and he looked down the road and
122 said, "Somebody is watching us." "What makes you think that?" About that time a buggy drove by. I thought I recognized Mr. Patterson. I didn't know Mr. Jordan. I just got a glimpse of them. It was Sheriff Jordan and Mr. Patterson. They drove right on ahead. Well, he watched those two men on horseback. He said, "I don't like it, it looks suspicious." I said, "I guess it is just two fellows that have been downtown to get a little boozy, or possibly there has something broken about the harness." He went and got a drink of water and pulled out his handkerchief and said, "I don't like the looks of those fellows, do you?" I said, "What's the matter?" "Nothing in the world, but a couple of fel-

lows been downtown and got drunk, or maybe something is broken. If you want to, we'll go back to town." He got in the buggy, drove about two steps, pulled up his horse short, turned around and looked. He said, "I don't like that a bit." I said, "What's the matter? Man, you are looking mighty suspicious to me." He said they looked suspicious. I said, "Those fellows have not got any such notion. Just go right along." "All right," he said; and drove on three or four more steps and stopped. I said, "The next time you stop, I am going to take the horse and buggy and go back to town. If there is anything about this transaction that is not straightforward I am out of it. If everything is all right you may go along with the transaction. What if those two men do come upon us, why we will have them go on about their own business." He drove on to the foot of the hill. He drove very rapidly. I never looked back. We went over the top of the hill and down into the bottom. He said we would stop there. I noticed as we crossed the road another buggy track; I made no remark. We got out and he began to tie the horse. I commenced unhitching
123 my side of the horse. He said, "Don't unhitch." I said, "Yes, it is my rule always to unhitch with a strange horse." Said he didn't want to unhitch. "It is the safest plan to unhitch," I said. Said he didn't want to unhitch. So I hitched up again. After that we started off through the woods, he walking ahead. He was taking the lead. I talked to him in as loud a voice as I could, without seeming intentionally loud. Walking throught the leaves made a good deal of noise. I suppose we walked 100 or 125 yards almost in a straight direction; he then began turning around. At last I said, "I believe you are lost out here in the woods." He said, "Oh! no we are most there." He had doubled back in the meantime. We approached then a place that was a little marshy and woods and briars, and you could not see far through it; I was behind him about three steps, he held up his hand, and looking at me with rather a startled face, said, "Look! there is the Indian!" And in a loud voice he said (here the witness mimicked the peculiar language they used as best he could). There was a repetition of the noise in the bushes. The man in the bushes repeated practically the same thing. He looked around at me and said, "That's him." I said, "Yes," and commenced looking through the bushes. They kept up that conversation for I suppose ten minutes, with various inflections of the voice. I naturally got a little interested to see who the other man was, and I suppose I was a little too eager in peeping through the bushes. The Indian's voice I suppose got quite angry. He told me to stand up straight. I straightened back, put my hat on the back of my head, and squared up. I could see the black object in there. I saw something moving, and could see the various maneuvers. He says, "He likes that better." I said, "All right." They conversed again for several minutes, and again the Indian's
124 voice got even more antagonistic than before. He shook the bushes and I could almost imagine I saw a tomahawk waving around in there. I said, "What's the matter with him?" He said, "He's not satisfied. You know Indians are mighty suspi-

cious." I said, "Well, what will satisfy him?" I said, "You tell him I'm Andrew Garrett's brother." He said, "That's a good idea." So he had another conversation with him, and the Indian's voice got very soothing and complacent. It dropped its tone several degrees. He said, "That fixes things all right. I will go and get the bricks. I will go and get the bar." I said, "You had better let me go with you." "No," he said, "you stand right still. The Indian don't like white men anyhow." So he approached the Indian, and they kept up this conversation between them pretty steadily, and he went to pick up the bricks, the Indian again remonstrating quite distinctly, he sounded like a remonstrant, and he set them down and explained it to him, laid it off with his hands, etc., and the Indian gave his consent apparently, and he started off with it. He got about half way and the Indian again raised a remonstrance and he sat down on the ground and explained to the Indian. I said, "You had better let me help you." I had a little curiosity to get a little closer view of the Indian. He said, "You stand right still." I said, "All right," so he brought them forward; in one hand he had a brace, and in the other he had a pair of spring balances. And when he came up to where I was, he said, "Now, we'll weigh them." I said, "All right." They were in some oilcloth wrappers, with a heavy strap around them.

(Here counsel for defendant objected to the State offering in evidence the package or the substance claimed to be in the package; or substance shown or exhibited to the witness on the occasion when he accompanied and was with the two defendants Thompson and Daley in the woods near Greensboro, upon the ground of identification of the object or substance now offered as being the same, and for the further reason that the object as described by the testimony of witness was one securely done up and bound by a shawl strap, and the object now before the witness is not so done up and is not bound by a shawl strap, and further because the package and contents are not relevant or competent.)

125

Before ruling upon the objection, the witness was allowed by the court to further describe and identify the package; when he said that it was black, was wrapped and tied with a leather shawl strap, and that he saw it unwrapped at the time; that it is the same package and——

7th excep. 7th ex. The objection was then overruled by the court, to which defendants then and there excepted.

The two packages and contents were then offered in evidence, to which proffer the defendants, by their counsel, objected because neither the packages nor contents *was* of the *res gestæ*, *was* no part of the representation and *was* not a token of a public character, or of such as was calculated to, intended for, or capable of deceiving, and because irrelevant and immaterial.

8th excep. 8th ex. Which objection was overruled by the court, and defendants, by their counsel, then and there excepted.

The witness Garrett, then said the package was unwrapped after weighing by spring balances. He came up with a brace in one hand and a spring balance in the other, and as he reached down to get the brick, he said, "Now we weigh him." I said, "All right." So he took the balances, and his first effort was to lift it up in front, but it was more than his grip permitted; so he stood almost astride
126 of it, and he could not carry it from the ground much. So I had to get right down on the ground to see the figures, and I took my pencil and followed the dots, and said, "95, 96 pounds." He said, "Let's try him again," and with that he pulled it almost up again, and I counted, "93, 94, 95, 96 pounds." Then he said, "We will weigh the other one." And then he got in the correct position, and we weighed the other one, which weighed, as I remember, 95 pounds. While I was figuring he was down on the ground unwrapping the package, took off the oilcloth, then the flannel. The packages before me are the identical ones which he showed me on this occasion. I notice the same mark now upon one that I noticed then. After weighing both of them, he then unwrapped one, and he looked at it, and I went right down on the ground and said, "Is that thing gold?" I looked up at him, and he said, "Pure gold, 22 karat fine." I said, "My God, it's a pretty thing as I ever saw in my life." He said, "Ain't it pretty?" And just in that attitude, as he sat there, he was putting his bit into the brick, and said, "Now we bore him." I reached out my hand, and I heard a voice in the woods some little distance say, "Throw up your hands." The miner Thompson heard something apparently and with the brace in his left hand—whether he dropped the brace or not, I do not know, but with his right hand he went into his coat pocket; I sprang at him and said, "What's the matter?" He asked me, "Did you hear something?" I said, "No, not a thing," and he said, "I thought I did." I said, "I heard nothing." I said, "Give me the brace now and let's bore this and get out of here; there may be somebody prowling around here," and so he took his hand out of his pocket. I got astride of the brick again, the one on the ground. I did not have the brace and bit in my hand,
127 but just at this point I held my hand out for the brace; then a voice very much more distinct and penetrating says, "If you don't drop that I will put a ball through you." That was a voice back in the woods. The Indian in the meantime was keeping up quite a chatter. I didn't pay any attention to the Indian. As soon as he heard that remark, he again sprang up and went into his pocket again. As soon as he did I sprang at him and caught his coat and held it down so he could not spring his hand out. I said, "My God Almighty there's one behind every tree in these woods! Man, you have played a mean trick on me! You have fooled me away from home up here, where we are surrounded by officers. He said, "I didn't do it." About that time a man ran up and came around behind me, and laid his hand upon the man and began feeling in his pockets, and all up to his face; seeming to be satisfied with his search, quick as thought he turned around to me and said, "What's your name?" I said, "My name is Garrett." "What are

you doing up here anyhow?" He said, "That makes no difference, I am an officer, and I command you to take charge of this man." "Me take charge of him?" "Yes." "Suppose he tries to run away from me?" He says, "If he moves a finger, shoot him." That was Mr. Patterson.

9th ex. (Counsel for defendants object to any further evidence of the acts or declarations or conduct of the de-
9th excep. fendants being detailed by witness, after the approach of Officer Patterson, who then and there put the defendant Thompson under arrest. Objection overruled. Exception.)

At this point I realized that the officer had not disarmed the man, and that he evidently was armed, so I felt that it was prudent to let him see that I was protected, so I brought my rifle into evi-
128 dence. I held him there, and in a few moments another officer approached. Another man came up and began to search him, getting everything out of his pockets. Finally he took out a pistol from his breast pocket where his hand had been. As he disarmed him I released my hold, the officer had him under his gun; another one had a handcuff on him.

10th ex. Here defendants, through their counsel, moved to strike out the evidence just detailed by the witness,
10th excep. because it relates to facts and circumstances occurring subsequent to the termination of the alleged conspiracy and is not of the *res gestæ*, which motion was denied by the court, and defendants then and there duly excepted.

At this time I do not know if the Indian had been arrested. I saw an object; I could not identify the object. I saw it moving around. I recognized a lot of black hair.

The hair which was produced and shown to the witness was long and black and affixed to a false-face resembling that of an Indian, which the witness identified as being that worn by the defendant Daley at the time of his arrest.

Mr. Patterson took off the headgear and also a beaded buckskin jacket from Mr. Daley.

11th ex. Here counsel for defendants moved to strike out all the evidence given by witness with respect to the
11th excep. explanation and identity of the Indian garb, alleged to have been worn by the defendant Daley, and taken off of him at the time of his arrest, as detailed by witness. Motion denied. Defendants except.

I saw Mr. Daniels make a move to take something from the miner. Mr. Daniels took a card, I think from under the miner's foot. Some words passed then.

12th excep. 12th ex. Defendants' counsel here moves to strike out the evidence with respect to the
129 card, as detailed by witness. Motion denied. Defendants except.

The card read Henry D. Hawley, Hotel Guilford; that is one of the defendants. The two defendants, Thompson and Daley, were then arrested and brought to town.

"My purpose and intention after the interview with Thompson in which my suspicion was aroused was to come to Greensboro, and if the proposition which he was making me was a legitimate one, and truthful, to trade with him; but if it developed that the whole scheme was a fraud, and their purpose was to cheat and defraud me, I proposed to turn them over to the legal authorities, and have them punished."

Being cross-examined by Mr. Gilmore, the witness said:

Paul Garrett cross-exam.

That he is 38 years old, six feet tall, weighs 205 pounds; of common-school education; been engaged in the manufacture of wine since he was fourteen, and since 1890 has been at the head of the concern; that the annual business ranges from $100,000 to $150,000; that he employs about forty people; that the moment he first met defendant Thompson, he was dictating to his stenographer, and that by invitation Thompson waited until he was through.

It puzzled me to know how he got into my office. I spoke to him about five minutes, and asked him what his business was, and he said he wished to see me privately. I don't recall what I said to him, but he insisted on seeing me privately. Do not remember his words nor mine to him, but we went through the shipping-room and on to the outside of the building, a distance from my office of 60 to 75 feet.

Up to this time he had said nothing as to what his mission
130 was. The first thing he then asked me, if I had a brother Andrew Garrett, and I told him no. He said he was sorry, that he was looking for Andrew Garrett's brother. As we talked I looked straight at him. I told him I had no brother; never had but one, and he died in infancy. He said that Andrew and he had been partners in Arizona, and that about four years ago Andrew had come back to his rich aunt, living in Charlottesville; that she had written him a letter, and he had come back to look after her property; and before he had left he and Andrew made a bargain that if either one of them ever ran upon anything (I cannot give his exact expression, I will do my best at it) that they would let the other know. That he had come to look for Andrew, but found that Andrew was dead, and his aunt had gone away; and at Charlottesville he was told that there was a man at Weldon named P. Garrett; that he knew Andrew had a brother named Peter, and he thought it was him, and he had come to look and see if it was so, and he was mighty sorry that I was not Andrew's brother. I told him no, that my name was not Peter, that it was Paul, and as I could not serve him, I was busy. He said, "Looked like nobody didn't want to talk to him anyhow; he warn't after no money; had plenty of money;" and with that he exhibited his roll of money. A little purse with a lot of money. It was a leather purse with a number of large bills, some in denominations of $100, and there seemed to be several of them. He made the impression on me that he was not after money. He said he was not after money. He then took up the question of being a poor ignorant man; that he could not write

nor read nor figure. He then said he was looking for Andrew's brother to take Andrew's place—to take Andrew's interest; that he and Andrew had bargained that if he was ever rich he would take
131 him in. He wanted Andrew's brother to look after the business of the enterprise because he (Thompson) was ignorant. I told him I did not see what connection I had with it; that I was not Andrew's brother. Up to this time I had not become interested in the matter. He represented that he was mighty sorry; he didn't know what he would do; that he could not find Andrew's brother nor Andrew, I told him I didn't know what he would do either. He then said that he had met a man on the train who told him that I was a good man at figures and honest. I told him I tried to be.

From what he said I gained the impression that I might take Andrew's brother's place, and I told him that if it came to a question of business consideration, I was open to any business proposition he might see fit to make. He stated that they wanted some good man; that the job was going to somebody, and that if I didn't take it somebody else would. He said he needed a man that could read, write and figure and was honest.

Up to this time he had no opportunity to know that I was such a person; he said he wanted such a party. I asked him what there was in it, and that he might ascertain regarding my competency and honesty from my partners and the business men of the community. He then repeated substantially what he had said about Andrew's brother, and that he had found this man before in Arizona, and that he was on his way east for the specific purpose of purchasing mining machinery and taking out a patent on this mine; that he needed somebody to go with him to Philadelphia, and he thought that I would answer; he explained they had previously worked the mine with Indians—six squaws, no machinery, that it was machinery he wanted to arrange for; that he had found the mine
132 about two years ago; that the equipment he had operating in the mine was not sufficient, that he wanted to get machinery; that he had none; he then practically enumerated all the machinery he wanted; spoke entirely familiar of it; for that kind of stuff; I told him I would have to rely upon him as to the place where and the equipment to be bought; he then made me a proposition as to my services in connection with the enterprise; he offered me one-third (⅓) interest in everything he had, mentioned the two bars of gold; I told him that there was nothing material in that, and that ordinarily I got something for my services, and that I should expect my expenses paid and a remuneration of $25 per day. We came to the agreement that I should have my expenses and $25 per day; that was our contract, with the one-third (⅓) interest. I was only to give my services as consideration; the $25 per day was to cover the time that I was absent from my business, going to Philadelphia and Washington, or to Arizona, and the one-third (⅓) interest on the confirmation of the Indian; so far as Thompson was concerned we made the agreement. The $25 per day and expenses was to apply only to the time that I was neglecting my own business for the other, absence from home caused by the work pertaining to the

gold mine and the purchase of machinery. The business management was all I was to give for the $25 per day, and the one-third interest; I don't consider I was receiving a double compensation; it was the compensation he and I agreed to. He then paid me ten ($10) dollars on account of expenses in good money; I suspicioned it as bad money at the time he gave it to me, but took it right down to Mr. Smith, cashier of the bank of Weldon, and he said it was good money.

Thompson first called on me about 9 o'clock, a. m.; was
133 there about two hours, when he left, walking back to the station. As he departed to return to the depot, I called the attention of Mr. Cole, my book-keeper, and another employé in the office, to look out of the window, saying, "There goes a gold-brick man." We all three observed him a couple of minutes, all took a good look at him. I suspected as soon as he mentioned the Indian and the gold brick hidden up there in the woods that he was a gold-brick man; that was before he paid me the ten ($10) dollars. I had suspected that this transaction was fraudulent before he paid me the ten ($10) dollars. I have never returned it. I did not return it after I knew it was good money and suspected the transaction was fraudulent, because I expected to go to Greensboro. I retained it to defray expenses to watch developments in the gold-mine scheme. It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction. I went down to the depot to the 11.30, when I showed Mr. Smith the ten ($10) dollar bill, and later met Mr. Thompson at the depot shed in Weldon, where he was waiting to take the train, and after suspecting his story I had a conversation with him, we went over the ground practically again and discussed quite a number of things; we made arrangements regarding the machinery and figured it out, I professing still to be his partner, meaning to carry out my part if figures had truly represented facts. I proceeded further to honestly carry out my part of the contract by making arrangements to come to Greensboro; by arranging my business so I could be absent from home a good while; left instructions with my assistant as to what should be done during my absence if I should be gone over two or three days,
and made those preparations which I ordinarily make
134 when being called from home on business; and made such arrangements in an honest endeavor to carry out my part of the contract. Had a conversation with Mr. Smith regarding it; introduced Mr. Smith to Thompson at the shed. While talking with Thompson, I went into a saloon for a pencil to figure up the machinery, returned and waited with him until he left on the train. There was possibly an exhibit between him and me of the telegrams I had written; possibly I asked him to show me which one meant for me to come, and which one not. My memory is faulty at times. I talked with him twenty or thirty minutes at the shed; saw him take the train and after he had, I hung around the shed for a while and went home, and proceeded to attend to my business affairs until the arrival of Mr. Lewis, whom I had telephoned, after Thompson

left my office and before I went to the depot. I said to him over the 'phone that I had a matter of importance to consider with him. He arrived about 3.30 p. m. I explained the matter to him. That afternoon I wrote a telegram to the chief of police at Richmond, Va., that I had a gold-brick gang spotted, and wanted them to send me a detective to the Monticello hotel, Norfolk, Va. This is in the afternoon of the 20th day of March, 1901, that I have reference to. The same day I first saw Thompson. Up to this day I had not seen or heard of any of the other defendants in this case, except the Indian. Mr. Thompson told me in the first instance that he had an Indian associate; that together they were interested in this transaction.

I went to Norfolk the morning of the 21st, leaving about 4 o'clock in the morning; bought a piece of property approximately of the value of $40,000; I paid $1,000 cash and up to that time
135 $1,250 note, and made other notes of $1,250, each payable monthly; don't remember the exact amount of unpaid purchase-money; but think it cost in the aggregate about $70 for revenue stamps on the deed and mortgage. When I left home I took $75 with me. I left Norfolk for Greensboro by way of Weldon, traveling on mileage, and including the sleeper and hotel bill I had to pay at Raleigh, I think it would have exceeded ten ($10) dollars. I drove out to the house of Mr. Mims on the evening of March 20th, 1901, and asked him to come to my office, which he did, and I wrote a letter on the typewritter, single-spaced over two pages long, addressed to Mr. Patterson; starting with an introduction of Mr. Mims, accompanied by a letter of introduction from Mr. Lewis, and requesting Mr. Patterson's assistance in the apprehension of certain men, whom I had reason to believe were criminals, saying I that day had a call from a man, describing him and giving his name, and repeating nearly as one can in a typewritten letter some of the characteristic remarks that he had made, and as nearly as possible in the language he gave, describing him so that he could know him. I then outlined to him the leading impression that the man had left on my mind by his conversation, including the impression of the many possibilities that there might be something in it, but that the preponderance of the evidence made me believe he was a man whom it was my duty as a citizen to apprehend and bring to the bar of justice, and I asked his assistance in doing this. The greater part of the letter was devoted to a description of the conversation between us, and the grogramme and plan outlined by Miner Thompson; in order that Mr. Patterson's judgment might be used with some discretion. I told Mr. Patterson that the letter as written, would no doubt sound pretty fishy; that I placed myself entirely in his hands for him to
136 protect me, if the following out of these plans developed into danger and that in the event of any emergency or necessity for action that I hoped he would not stand for a moment, but shoot straight to the mark, and be sure to hit the right man. I mentioned my suspicion that possibly there was some reward for the Withers gang, and that in such event I proposed to deal liberally and not be hoggish about the matter. But I impressed on him that the prime

consideration was not reward, but was to carry out what I thought to be my duty as a citizen, and to bring these men to justice if it should develop that they were crooked. I meant by liberal, that I would not claim all the reward, meaning to divide such reward as might be obtained with Patterson and others; that I could not give to myself all the credit of any remuneration that might come. I think I said that the reward in the Withers case was very large, my impression at that time was, it was for $20,000. I did not mention any sum in my letter.

I signed, folded and gave the letter to Mr. Mims with $20 or $25 for expenses. I directed that he read the letter for his own guidance, and deliver it to Mr. Patterson, and to be governed by his advice. My conversation with Mr. Mims before his departure was about five minutes. I heard from Mr. Mims by telegraph at Norfolk the next day, which telegram read: "Men are located; arrangements complete." Arrangements had reference to my protection. I thought I was up against a pretty hard proposition; I didn't want to be carried out into the woods and to be butchered; I went up against the proposition with suspicion that it was crooked before I accepted the ten-dollar bill. I thought when I called my stenographer's and clerk's attention to look out of the window some 70 feet away and observe a gold-brick man, that he was a fraud; and
137 thought it pretty strong, and was under that impression when I took the ten-dollar bill down to the bank and had it examined, and had the same impression when I sent the telegram to the police of Virginia, the next day. The protection I thought Mr. Mims would arrange for me at Greensboro, was fire-arms. Upon my arrival at Greensboro, I met Mr. Mims and Mr. Patterson before starting with Thompson to the woods where the supposed Indian was. Patterson told me he had communicated with the sheriff, but no papers had been issued. It seems that the magistrate thought it was too thin a tale. Patterson told me this. Mr. Patterson told me that he had turned my letter to him over to the sheriff, and that there had been considerable consultation over it, and that the sheriff had taken the advice of attorneys, and that the matter had at that time been submitted to the justice. I talked with Mr. Patterson pretty plainly for about thirty minutes before leaving for the woods with Thompson.

Upon my arrival at Greensboro, Mr. Thompson met me at the depot and he walked with me up to the McAdoo house; sat down with me in the corridor; had quite a long talk, going over the ordinary discussion. He wanted to know where I had been and what I had done; I asked him which way we were going, how long it was going to take to get there; which direction it was from there; if there was woods around here sufficiently thick for an Indian camp; and he told me that we would get enough borings from that brick, after it was melted down, to make a nice ring for my wife, and one thing and another; he said that at the time, and he said the same thing at Weldon; said I could use the borings for that purpose; he was going to give them to me. We talked of the ex-

pense of the trip to Philadelphia and Washington, and as to
138 whether he had money enough to defray the expense. He handed me his money to count and asked if that was sufficient to take the trip contemplated to Philadelphia and Washington; I told him it was.

It was my intention during that conversation to take the train and go to Philadelphia; but that was not altogether my reason for wanting to know if he had sufficient money to defray the expense; I told him at that time he would have to loan me something to pay my hotel bill before we could leave; I asked him for no specified sum; he did not refuse to let me have any part or all of it. I had some accrued compensation up to that time. I didn't talk with him as to an advance on account of compensation for time already devoted to the scheme; I didn't make the effort, because I didn't want to pull his leg too hard at once, thought it would create suspicion; had not at all changed my mind. Have not made any demands on him for money at all. I have entered a suit here, don't remember the amount; I think I swore to an affidavit in the suit brought against these defendants, but cannot recollect positively; that is my best memory in that instance. Referring back to the instance of bringing suit, I cannot recollect the amount I sued for; might get it by reference to the papers, but not to my mind; I think it was a "claim and delivery" suit for breach of contract. I was trying to recover a certain amount of money that they had in their possession. The defendants had a contract that I was trying to recover; I had not made any demands on them for the performance of the contract. My memory refreshed by my signature to the affidavit before John J. Nelson, clerk of the superior court, on the 23rd day of March, 1901, that I there swore that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Haw-
139 ley were indebted to me in the sum of $2,000. I put that as a light estimate on the mine, one-third interest in which I was suing them for—one-third interest in this gold-mining property. I attached everything in sight that belonged to them; the suit is still pending. I claim they are indebted to me. I rest upon the paper—$2,000. Thompson represented to me that there were two gold bars at Greensboro, worth $36,000; two others in Arizona, worth about $48,000, and a gold mine in Arizona worth millions. I thought my claim was very reasonable. I had a third interest. I had never met or talked with defendant Hawley before I brought the civil suit; I involved him because they all seemed to be in the gang. I involved Daley because I had a telegram with his assent to the contract. It was the telegram Thompson sent me, "Gonez willing." He was to confer with him, and wire me if he was willing. That telegram said nothing about Mr. Hawley. I involved Mr. Hawley in that suit because I was playing for all in sight. That civil suit is still pending as I understand, and I understand that property of the defendants was seized under the process in that suit; but I do not know what the property seized is, and don't know as a matter of evidence what property was seized under that process. I got possession of the newspaper clipping I have read from and

offered in evidence from Mr. Brooks or Mr. King, or some of them. After the attachment I retained Messrs. King and Kimball to bring this civil suit for $2,000 and advised with them about it. Immediately after coming from the woods I drove to their office and retained them to appear in this case. They are the first lawyers that I saw in connection with this matter. I did not know when I first went to their office who the State solicitor was. I did not find out who the State
140 solicitor was until after supper, when I was introduced to Mr. Brooks as solicitor. This civil suit was entered at 2 o'clock in the night. I do not know who went on the attachment bond in the civil suit. I have no recollection. My recollection is that Mr. Mims went on the bond; I don't remember requesting any one else. The papers were ordered in Messrs. King & Kimball's office after 12 o'clock at night. I heard the examination of the defendants before magistrate, which concluded about midnight. I went to the woods the same day I arrived at Greensboro, and went to the office of Messrs. King & Kimball on the same day and sued out the attachment for $2,000 on the night of the same day; I was willing to get $2,000 if I could. When I arrived at the woods Thompson brought out two packages, both done up in flannel oilcloth, and bound with a shawl strap, and we went through the process of weighing them; remember weighing each one of them, down on my all-fours with pencil and paper in my hand to set down the weight. I stood up between their weighing sufficiently long for him to change the scales from one package to the other. It is not true that while weighing the second we heard a cry "Hold up your hands, or I will shoot." Mr. Patterson came up toward Thompson and I stood, caught Thompson by the arm and said, "You are under arrest;" I then said to Thompson, "This is a mean trick you have played on me to get me here away from home in a strange land, and get me arrested." Patterson then turned to me and said, "What's your name?" I said, "My name is Garrett." "What are you doing out here? You got nothing to do with this." I was scheming, I was matching my wit against his. He says, "That makes no difference, I am an officer and I command you to take charge of him." At this time Thompson had put his hand in his pocket, as if to draw a weapon; he had
141 not drawn it. This was after the cry of some one, "Hold up your hands, or I will shoot you." I pulled a gun I had in my right outside coat pocket. But I had that gun out before Mr. Patterson came there, a few minutes I suppose, when I was holding out my hand for the last boring. I am right-handed; don't think I could have missed him that close. I tried to keep up with Thompson's lies. The only difference was, he lied straight to taw, I tried to serve my purpose better. Don't think I had to lie to him. I took the gun in my right hand out of my pocket and held it a little back of me, and the officer said If you don't drop that gun I will put a hole through you. Thompson said, "Officers!" I grabbed him, and said, "For God's sake, don't pull a gun they will shoot us to death." It was a Colt's revolver, nickel-plated. When I made this remark to Thompson the gun was in my hand behind me. I brought it into evidence. Patterson had not robbed him of his gun; I

thought there was one there, but I had not seen it up to this time. I saw Deputy Sheriff Weatherly take a gun from Thompson's right inner pocket of the lapel of his coat. I had my gun in my hand at that time; had had it there for awhile. I do not remember that I was frightened as we approached the woods; I remember a wagon passing us on the way, and stopped for a drink. Thompson acted afraid, and I insisted that there was nothing to be afraid of that I was going on. I invited him more than once to proceed on. At the time Patterson came up, he had the brace in his left hand; his right hand in the right lapel of his coat. I was mistaken when I heretofore said that his right hand was under the left lapel of his coat. I don't think that Mr. Weatherly took a gun from his right-hand pants pocket. It was taken on Mr. Weatherly's search;
142 Mr. Patterson made a brief search around his hips, but did not get as high as his coat pockets.

I wrote the attorney general of Virginia to know the reward offered for the Withers gang. This was after I returned home from Greensboro. If there had been a reward I would not have hesitated to accept it. It was my purpose to divide the reward with those that assisted me. I felt that it was too delicate a matter to approach gentlemen with, to offer them a fee for services of that nature.

At the time of Thompson's arrest in the woods he asked me a number of questions, but I only replied to the last one, knowing that he would have an opportunity to ask the same in the court-house. It is not my recollection that he there said to me that he had not asked me for any money, or that I replied to him, "No he had not, but that I had ten dollars of his money and would get more," that such in substance was not said at that time. Mr. Thompson said at the McAdoo house that he would pay all expenses.

Q. Don't you know at that time you told him you had no money with you?

A. I told him I would have to borrow some money.

Q. Didn't you say to him that you would have to borrow some from him?

A. I think I did.

Q. And that was before you started to the woods?

A. Yes.

Q. Were you telling the truth?

A. I think I had a little. I didn't want to be taken up. I explained to him at the McAdoo house when I counted some $340 of his money that I had become indebted at Norfolk, Va., and the character of the indebtedness. I have retained Messrs. King
143 & Kimball to assist in this prosecution; so retained them the evening of the arrest. Before I knew that the solicitor was in town.

Q. Do you regard yourself responsible for this prosecution?

A. Not at all. I explained to Mr. King that I was in the hands of this people, that I had carried this thing as far as I could.

Q. Have you said to any one what you would do with the money realized from this civil suit for $2,000?

A. I think that is the only time I have made any direct statement. I proposed to get some little souvenirs for my friends who had assisted me.

Q. Isn't it a fact that at the time you pulled your gun down and levelled it on the defendant Thompson in this case, that you had no positive information from any source that Mr. Thompson had told you an untruth?

A. I had reasonable ground to believe that it was an untruth. I had no positive knowledge, but thought it was a fake.

Q. Relying on that same judgment of yours, didn't it dictate to you the same thing when Howard was talking to you about this matter in your office?

A. Not so thoroughly.

Q. As he departed from your office and at the time that you called the attention of your stenographer and clerk to the appearance of Thompson, did that same judgment of yours convince you that this was a fraud at a later time?

A. Pretty much so.

Q. And the same day you took that $10 bill to the bank?

144 A. Yes.

Q. And the same day you telegraphed to the chief of police at Richmond, Va.?

A. Yes. The preponderance of the evidence was in favor of the fraud.

Redirect exam. On redirect examination witness identified two satchels found in the woods at the time of the arrest, and the same was offered in evidence.

The State, to further prove the case, produced and had sworn J. F. JORDAN, who testified in substance as follows:

J. F. Jordan, direct exam. My name is J. F. Jordan; am sheriff of Guilford county; remember the occasion of the arrest of Howard, Daley and Hawley. My first information of the matter was on the 22nd day of March, about 12 o'clock, when Mr. A. C. Patterson came into my office and gave me a letter which I read. I went to the telegraph office and saw Thompson about 1.15 p. m., on Thursday, the day preceding the arrest; he was sending a telegram when I went into the office. He had on a flannel shirt which looked as though worn for some time, and a kind of brown suit, and rather full beard, rather ragged; and a crushed hat, light-colored. I heard the operator read the telegram over to him, which was addressed Paul Garrett, Monticello hotel, Norfolk, Va., and read, "Gonez willing; come tomorrow." It bore a cross-mark on it in blue pencil. Thompson then came out of the telegraph office and went into the hotel Guilford; left there ten minutes later. I next saw defendant Hawley at the hotel Guilford with Thompson; he went out at the same time. They had at that time a little conversation and then separated, Thompson going down the street and Hawley going back to the hotel. I came back

to my office and remained a little while, and then I went
145 home to dinner and came back and spent most of the afternoon driving up and down the main street here, stopping now and then loitering about. I permitted Mr. Weatherly and Mr. Mims to aid me in tracking these men. After Thompson and Gonez left the hotel I saw him and Gonez conferring together that afternoon once or twice before night upon the street near the McAdoo house, the first time on the opposite side of the street. I saw no further confidence between the defendants until the next morning. The next morning I saw Thompson, Hawley and Gonez in conversation three or four times before the arrival of the train from Raleigh, at 11.55. Their conversations were always more or less secret and suppressed; they seemed very anxious in their movements in anything they had to say to each other for about an hour before the arrival of the train referred to at 11.55, they were from the McAdoo house to the depot, and most of the time they were about the platform at the depot. This was the train Mr. Garrett came on; they were there when the train arrived. For a few minutes before the train came Thompson was standing before the entrance for white people at the main depot with his back right up to the wall; Hawley and Gonez were further down to near where the street crosses the railroad; they were near that point. There was a large crowd down there, and they were moving about in the crowd. Hawley and Gonez Bono were together; that was the position when the train came in. I did not know Garrett and I was watching who Thompson would go to see when the train came in. He walked up and met Garrett about one-third of the way from where the train was standing. Thompson and Garrett walked into the waiting-room and had, I suppose, five or ten minutes' conversation. They then
got up and came out of the waiting-room, turned around the
146 corner by Scott's store and started up the street; next came round on the other side of the depot and kept on the opposite side of the street from the one that Thompson and Garrett were going up, and they went about 30 or 40 yards behind Thompson and Garrett to the McAdoo houes. Garrett and Thompson went into the McAdoo house and took a seat on a bench in the lobby, just outside the desk. Gonez walked beyond the depot to where Washington street crosses South Elm at Scott's store, and took a stand there round the corner of the building and was watching the McAdoo house. Hawley got into a stairway leading up into one of those buildings right opposite the McAdoo house, occasionally coming out to where he could see and then retreating. I walked into the McAdoo house and saw Garrett and Thompson in conversation sitting there on the bench. I sat down a little while, and then got up and went into Holton's drug store and watched the movements of Hawley and Garrett; one was standing there watching from the corner, the other was in the stairway. When Garrett went up to dinner, I went up to dinner; returning at 2 o'clock, I drove in my buggy down and stopped a little north of J. W. Scott & Co.'s store, walked on down to Holton's drug store and went in. I saw Thompson drive up to the McAdoo house in a buggy and stop and I saw

Garrett come out and then get in the buggy. I am pretty positive that Hawley went across the street and said something to Thompson at that time; Thompson with his buggy was on the street. After they went off I went to my buggy as quickly as I could. I did not know exactly where they were going, but I had fairly a good idea, knowing the country as I do, from the way they started. I drove down to Ogburn's livery stable where Patterson was to meet me, in case they should start out to the woods anywhere,
147 and as I drove into Davie street, Gonez came up driving very rapidly the old horse that I knew very well belonged to Mr. Vanstory's livery stable. He drove on very rapidly until he got to the depot, and some freight trains crossing the street detained him a few minutes, and made him very restless and nervous. Finally he got across, and I saw him going pretty rapidly up Asheboro street. In the meantime Patterson came up. I told him what I had seen. We got into the buggy and started off, and I think the first sight we got of them was just before we got to the late Judge Settle's residence. We saw then Thompson and Garrett in the buggy, and Weatherly and Mims riding on horseback some two or three hundred yards behind them. We went on in that position until we got about two miles from town, and at — place, just about 2 or 2½ miles from town, Thomson stopped his horse, got out and went up to the well and got a drink of water, and when he stopped his buggy and got out Weatherly and Mims stopped their horses. I then whipped up my horse and drove up rapidly, without stopping as I passed them, said, "For God's sake men, turn and go back and don't stop here." They turned round and went on, and then I drove on as fast as my old horse could go, right by Garrett and Thompson at the well and some three hundred yards I suppose across the creek. When I got across Buffalo creek and looked back, nobody was in sight. I stopped my horse and remained there some three or four minutes and looked back and saw Thompson and Garrett turn off and leave the main road, and drive rapidly through the body of pines, leading round down Buffalo creek, drove my horse over the road, went back across the creek and Weatherly and Mims were then in sight. I beckoned to them to come on. They rode up pretty rapidly to me. Weatherly and Mims turned off the road, then fol-
148 lowing the tracks of the buggy that Howard and Garrett were in. I took Patterson with me and went right down the bank of Buffalo creek, and when we got about 200 or 300 yards down the creek I saw the buggy that I saw Gonez leave town in, hitched to a tree. Immediately beyond that was a pretty dense thicket; bamboo vines, grape vines, blackberry briars, and all such stuff. Patterson and I had not advanced more than 200 steps beyond where that buggy was hitched before we heard conversation going on in a very exciting manner. We remained there a little while and listened to it, as long as I felt it safe to do so. There was only one doing that kind of talking, but the other was in conversation a little beyond, some 20 or 25 steps, I reckon. Patterson went down the path and turned into the thicket, and I turned into the thicket and went im-

mediately to where I had heard the conversation. We did not make any noise as long as we were in the path. The leaves were very dry, and in fact my hat fell off, and I made some little noise, and when I got in some 25 paces of where Gonez was located, he rose right up and started toward me, using this peculiar language, and I covered him with my pistol, and said, "Throw up your hands, or I will shoot you, and I have the authority." First he did not throw up his hands. The second time I commanded and said, "Throw up your hands, or I will put a ball through you." When I said that he went down on his knees. I advanced rapidly, where I could see well, keeping him covered with my pistol. "Now, if you move a hand or muscle I will kill you," I said; "Close in, men." I did not know how many were around. I had my deputies surrounded and I wanted to get all I could. About that time I heard
Patterson get up to Thompson and Garrett, and I could not
149 from the distance I was at, and in the excitement and confusion, I could not tell exactly what they were saying, though I could hear them and see them. After I had hollered to the deputies to close in, and after I saw Weatherly and Mims get up to Garrett and Thompson, then I did not suppose any one else was in there, as they had come in without stopping anybody. I hollered to Patterson to come to me; the excitement had kind of worn off then and I saw Patterson was getting very near the Indian, and I let him go on until he got in ten feet of the Indian, and then I said, "There he sits right by you."

14th ex. Counsel for defendants here ob-
14th excep. jected to any further evidence as to what occurred after last statement of witness; because it appears by the witness' own statement that the alleged conspiracy was put at an end by the arrest of one or more of the defendants. Objection overruled. Defendants, by their counsel, then and there except.

I had just gotten up to the Indian. Patterson walked up to him and jerked his mask off. I found it on defendant Daley. He took off the mask, his beaded coat and red bandanna handkerchief. He looked like an Indian when he had his garb on. He was a very good representative.

Two cases were here shown witness.

I saw these cases when I went up to the Indian before I put my hands on him; they were only a few feet from him.

15th ex. Here counsel for defendants moved
15th excep. to strike out evidence as to showing the cases because an act or fact not of the *res gestæ*, immaterial and irrelevant. Motion denied, to which ruling of the court defendants, by their counsel, then and there excepted.

The first sight that he got of the Indian, was when he heard
150 him coming; he rose up out of the brush. I don't know where he got his pistol from; he had it waving to me, when I first saw him. When the mask was jerked from him he did not say anything. I then picked up the cases and this mask, I think both of these cases, and Patterson led the Indian up to where Gar-

rett and Thompson were. I saw one of the gold bricks uncovered about like this now. I recognize it by the mark that was made on it at the time. It was 6 or 7 feet from Thompson and Garrett. I saw the brace and bit that was exhibited here this morning. I could not say that I saw the scales. I saw the episode between Garrett and Thompson about the card that Daniels got from under his foot; it was not under his foot, but it seemed that he was trying to stick it up his trouser's leg.

The card is produced and identified by witness and offered in evidence.

16th ex. Defendants here objected to the witness stating anything in reference to the card taken from under the foot of defendant Thompson, or any declaration made by Thompson as to the same, as an act or fact occurring subsequent to the termination of the alleged conspiracy and arrest of one or more of the defendants. Objection overruled, to which ruling of the court defendants, by their counsel, then and there excepted.

16th excep.

The signature on the card is that of defendant Hawley. I took the card and put it in my pocket. Patterson and I left and came back to my buggy, and left the others to bring in these that had been arrested. Patterson and I drove rapidly back to town. I left my horse standing at the depot; Patterson got out on one side of the street and I on the other. Just before we got in front of
151 the Hotel Guilford, Daniels came up and we all joined there just before we got to the Hotel Guilford, and Hawley was standing in front of the Hotel Guilford looking down the street. He was just looking anxiously down the street. Patterson, Daniels and I walked up to him, and told him to come into the hotel very quietly, he turned right round and we all walked in together right into the reading-room and sat down. I said, "You can consider yourself under arrest." I told him I was sheriff of the county and had a warrant for him. I showed him this card and asked him if he knew it; if he knew anybody in Greensboro. He said he did not know anybody here, and he had never seen the card. I asked him if he had a room; said he did. I said, "Let's go to it." He, Daniels, and I went up to his room, and picked up a case he had; it looked like a dress-suit case.

Q. What did you find in the first one?

17th ex. Defendants object to any further evidence as to what was found in defendant Hawley's possession, or what was said to him by the sheriff of the county or any one in his presence at the time he went to his room, and before taken from the hotel while under arrest. Objection overruled. Defendants except.

17th excep.

Q. What did you find in the first one?

A. Went through the case and found nothing much except his personal effects, clothing, combs and brushes, and articles of that kind. We took this, closed it up, and picked up another case in the room, kind of a square case, and it was locked. I asked him for the key. He said he did not have the key. I asked him whose it

was. He said it belonged to a friend of his who had gone to Florida and left it in his room. In the meantime the key were given
152 over to us, and the second one we tried unlocked the case. I found this bag in his room, but it is necessary to state how it was found; I found it in the trunk of the Indian, when I examined it in the hotel, after I got possession of that trunk. We did not find that trunk that day. Late Sunday afternoon, as a matter of precaution, as I was the custodian of those people, I thought it best to search them. I went to the jail with my deputies and did so. I found a trunk check under the lining of his vest. I went to the Hotel Guilford and after some little search found this trunk in a back hall, in not a very conspicuous place, and I took possession of it, and went upstairs and we searched that and in that Indian's trunk I found that bag which you have in your hand. I found some things in this case; I found these blanks purporting to be assayer's blanks, and quite a number of typewritten letters.

These were offered in evidence and marked Exhibit C.

These were typewritten communications addressed to Harry, or William, or Henry, and in substance all the same, and to the effect that the addressee had been reappointed to the staff of the mint assayers, by the Government at the mint at Philadelphia. I don't remember where I first saw one of these letters. I found some safe keys, a good many bits, a dirk and bronzing fluid in the case belonging to Gonez Bono; bronzing fluid like that on the brick, and a lot of copies of Bradstreet showing all the banks in the country and portions of Canada; how the vaults were located, names of the officers and things like that; a very complete guide to all the banks in the country; railroad guides and maps, very complete, well gotten up and nicely bound. Bradstreet's Reports gives the rating of different men of wealth.

153 18th Ex. At this juncture, the defendants, through their counsel, moved to strike out all the evidence
18th excep. of the witness, as to the acts and disclosures or conversations with any one of the defendants in the absence of the others; and any and all evidence of the witness relating to property belonging to any one or more of the defendants, which was by the witness discovered and investigated subsequent to the arrest of defendants in the woods, because the same is not of the *res gestæ*, is immaterial and irrelevant. Objection overruled by the court, and defendants, by their counsel, then and there except.

I remember two different sets of maps spoken of; one in Hawley's baggage and one in the Indian's trunk. The Indian was stopping at the Guilford hotel.

Being cross-examined by Mr. Barringer, he testified in substance as follows:

J. F. Jordan—Cross-exam. I saw Howard with Hawley the day I made the arrest, a few minutes in front of the Guilford hotel; people were passing at the time

as usual; saw them down street further, that afternoon standing on the pavement; saw them about three times the first day; once at the hotel, and twice in the afternoon; don't know if he was a guest at the Hotel Guilford, except I saw him there and his name on the register. Went up to his room and looked in that case at the hotel. The next day after I came back from the woods saw Hawley go in the stairway opposite the McAdoo house. He went in and turned around and came out. He staid in there nearly thirty minutes; right inside the first entrance. He came from the depot about four or five yards beyond Garrett and Thompson, with a crowd that were at the depot. A great many people were going up the street on both sides. Hawley and Daley separated just before the
154 train came in; saw them together just before the train came in at the entrance of the white ladies' place of reception. I saw Hawley by himself at the depot in a great crowd of people. Saw Howard and Hawley together at the depot where South Elm street crosses the railroad.

I found three maps in Hawley's satchel. I saw him standing in the stairway between two or three o'clock. Don't know if Hawley and Daley had the same room at the hotel; I presume they roomed together from finding their baggage together; that is, this assayer's case was in Hawley's room; don't know if it was his. I think I made a mistake about their rooming together. I have been talking about Daley's baggage when I meant Hawley's baggage; I have been talking about this case when I was in Hawley's room. I will say I don't know anything about the room; I was mistaken about this baggage.

Being cross-examined by Mr. Gilmore witness said:

Q. Were you present at the preliminary hearing of this case?

A. I was.

Q. I will ask you if it is your memory if Mr. Garrett was asked the question at that time, if Mr. Thompson didn't say to Mr. Garrett, "I have never asked you for any money, have I, Mr. Garrett?" And Mr. Garrett replied, "No. But I have got $10 of yours and I will have more?"

A. I remember that there was something of that kind said; just what it was I don't remember.

Further examination in direct by Mr. Brooks:

J. F. Jordan—Redirect. Said he never heard Garrett say that he had ten dollars of his money, and would have more, but he heard them have something like a quarrel.

155 In Hawley's room the only baggage I found was this case and Hawley's satchel, which he then disowned and declared having a key to; when urged he produced the key.

To further prove its case the State called W. J. WEATHERLY as a witness, who, being duly sworn, testified in substance as follows:

W. J. Weatherly—Direct exam. My name is W. J. Weatherly; am deputy sheriff of Guilford county; have served twenty years as policeman, three years as deputy sheriff. Sheriff Jordan first intimated the presence of the defendants in Greensboro on Thursday, March 21, 1901. I went on the street looking for the men and saw Thompson standing against a store on South Elm street eating an orange. He looked rather rough; had on a sort of brown-looking suit and flannel shirt; broad-brimmed hat, his hair being longer than it is right now; beard all over his face, but not so very long—a good heavy beard. I saw him on the street several times that day—up and down the street—and think I saw him and Hawley together once or twice. The first time I saw them together about the Guilford hotel, then toward the depot near Scott's store. I saw them together twice on Thursday in the afternoon; I saw Mr. Daley with Mr. Thompson once in the afternoon near where Jim West keeps on South Elm; they stopped, had a few words, and passed on down the street together. That is about the only time I saw them on Thursday. I saw them the next Friday morning; saw Mr. Thompson first; he seemed to be walking up and down South Elm street. Then I saw him and Mr. Daley in the morning the first time where the Benbow hotel is building now. I saw them meet there; I think they stopped and had a little talk, and Thompson went on toward the depot and Daley came up the street.

I saw Mr. Thompson on the street pretty regularly all the
156 time up and down towards the depot. I was at the depot when the train came in on Friday, which Mr. Garrett came in on. Saw Mr. Daley and Mr. Thompson both at the depot, and saw Mr. Hawley at the corner at Cleggs'. Mr. Thompson seemed to be standing back against the depot for awhile, just before the arrival of the train. Mr. Daley passed him two or three times up and down the platform, and would speak to him as he would go by; they made remarks to one another; just before the train came in, Mr. Thompson, who was walking up and down the platform, seemed to be restless, and Mr. Daley would pass him every once in awhile; they never passed without they looked like they spoke, saying something to one another. Hawley was walking on the platform part of the time, and for awhile stood back against the depot near the sitting-room door. I left him right on the corner. Cleggs' corner is just across a narrow street not more than 20 feet from the depot. One standing there could readily see passengers leaving the depot. When the train came in and Mr. Garrett got off, Mr. Thompson spoke to him, and they went into the depot; I went in there too and they went over to the northeast corner and sat down and talked a little while there and came out; I followed along. Mr. Daley was then standing on the north corner of the depot, the one towards the railroad. He was standing on the platform of the depot at Clegg's hotel. I didn't see anything more of him until I came out. Mr. Daley went across the street, on the right-hand side of the street,

and as Mr. Garrett and Mr. Thompson went down on the left-hand side of the street, he went down on the right-hand side, and Mr. Hawley followed along behind him. I was right behind him. Mr. Garrett went on down the street. He and Mr. Thompson went
157 in the hotel. Mr. Hawley went down below a drug store, and went and stood up in a door. Mr. Daley came across and looked in the hotel, and went across to him and said something to him; then he went right up the street to Mathews-Chisholm-Stoud's corner, and stood around the corner. He stood there waiting some time. Mr. Hawley was right in front of the hotel, and Mr. Daley was a little further up the street, and could see the hotel. I saw him when he left the corner at Clegg's hotel. He came on down the street at a pretty good gait. The stairway he was standing in the door opens right on the street; you come in and it is some five feet I reckon before you strike the steps to go upstairs. He was standing right inside. I don't know what become of Mr. Daley at the corner; that is the last I saw of him, but Mr. Hawley stood there for awhile, round about, and after awhile Mr. Howard drove up with a buggy in front of the McAdoo House. Mr. Hawley went across the street and said something to him. He had come on the outside of the door. He went across the street to speak to Mr. Howard. When he came back across the street, he was looking around, seemed to be very restless. I was standing looking through a window at him. He started in the house that I was in. I got under the counter. I told the young man if anybody came in there and asked for me to tell him he knew nothing about me. He came in the house and stood in there a little while and went out. I was hid under the counter. This was Jim West's place of business. He went out and I went to the door and looked out, and saw him go into the shoe store. Garrett had come out and got in the buggy then, and started up the street. I had a horse over at Ogburn's stable right across the street. When he went in the shoe store I went across the street, and went down there and got my horse; met Mr. Mims there. He and I
158 got on our horses and rode the other way. Just as we got around the other way, Mr. Garrett and Howard came out of the lot where a livery stable stood. We met them nearly face to face. We turned right down the street and let them get on a piece. Mr. Garrett and Howard had gone on in a buggy. We turned down and came up to the court-house a piece, then we turned back and followed the buggy on out. We drove very slowly and tried to keep back about the proper distance. About 2½ miles from here we came in behind a wagon; the wagon stopped and for some reason or other the buggy was brought close to it. They stopped. Mr. Howard got out and went and got a drink of water. Mims and I were pretty close on them then. Sheriff Jordan drove right up behind us. He drove on by us. We got down then. They drove on then after they got their water. We followed on, then turned out to the left and went down through the pines. We went on down to the bridge and met some other parties; dismounted and tied our horses; and Mims and I undertook to follow the buggy track

through the old field, we followed it to the pines. There was a double track, but we didn't notice that until we came back. We followed one track to the road. We came to a different horse and buggy altogether, a horse that I knew very well tied out there, and it was not the horse that I was following. We went back to the path, and took the other track, and went down and found the other buggy tied in the woods. We went down to the creek, I reckon probably 100 or 150 yards. I heard some one talking. The first noise I heard I couldn't understand at all. It -as sorter of a j— — — — —. Then I heard the sheriff's voice. I knew his voice. I heard him holler: "Close in! Close in!" We went right in then, and I saw Mr. Garrett and Mr. H[illegible]ard standing by
159 a tree. Garrett had his hand on his shoulder. Howard was standing there with a brace in his hand. I went up to him and asked Garrett who he was. I think he said, "I am in charge of this man." I said, "You get away from here." At this time Mr. Garrett had his pistol out; at this time I saw one of the bars of metal.

19th excep. 19th ex. Here defendants objected to any further examination of witness relative to anything done or said further, or subsequent to the time that the officers arrived in the woods and arrested any one or more of the defendants, because it is a circumstance occurring subsequent to the consummation or discontinuation of the alleged conspiracy, is immaterial and irrelevant and not of the *res gestæ;* which objection was overruled by the court; to which ruling defendants then and there duly excepted.

I saw a gold brick on the ground; there was but one open and another one wrapped up in a cloth that was opened afterwards. I know nothing about the baggage of this gentleman, that was at the hotel. I saw the Indian garb.

Being cross-examined by Mr. Gilmore the witness said:

Weatherly—Cross-exam. I did not see Mr. Patterson at the time he put Mr. Thompson or Howard under arrest, but did soon thereafter. I participated in searching Mr. Thompson for weapons; I found a revolver in his pants' pocket, and took it out myself.

Being cross-examined by Mr. Barringer witness said:

People frequently located on the corner at Clegg's hotel, where he saw Mr. Hawley standing. One standing there where he was could not see the passengers get off the train; when the train pulls in from the east it usually leaves the hindermost coach in
160 full view of the street, so Hawley could have seen the crowd alight from there from the position in which he stood. I went down there to watch for Garrett; saw Howard meet him; there was a great many people at the depot walking about. Mr. Hawley was walking about.

Re-examination by the SOLICITOR:

Redirect exam. Mr. Thompson had his pistol in his inside pants pocket on the inside; it was not in his usual pocket. I recognized Thompson on the street by the description I had of him from the sheriff. I saw the letter the sheriff had.

The State further produced GARLAND DANIELS, who being first duly sworn, testified substantially as follows:

Garland Daniels—Direct exam. My name is Garland Daniels; I live in Greensboro; I remember the occasion, the 21st day of March, the day preceding the arrest of the defendants; I was in town but did not on that day see any of the defendants; I saw them on Friday; saw Mr. Howard first about 8.30 o'clock when I was going to breakfast. He attracted my attention by looking back at me, as he was quite a fine-looking fellow for a workingman. I kinder sized him up. I saw him no more that day. I saw Mr. Hawley and Daley on Friday, paid no attention to them at first; they looked at me as I passed them on the street, which did attract my attention very much. I watched them standing on the street together for some little time. I saw them two or three times in a door across from the McAdoo house, which is right across the street from my store. My office is in the window of my store, where I could, without trouble, look across the street. I saw them talking considerable; they would first go up to the corner around Shields' shoe store and then to West's place. I saw them separate and meet at the doorway again.
161 Howard put up a fine appearance for a farmer; he looked fine; he was walking with his hands folded behind him; had a beard then, and attracted my attention. Had on a kind of light suit, gray mixture of some kind; think he had on a soft shirt. I followed the party out to where they were arrested. I got there just in time to hear the Indian make a sound something like a dog barking. It was all done so quickly. I have seen this card before marked Exhibit B.

20th except. 20th ex. Here defendant Hawley, through his counsel, objected to the evidence relating to the card found at the feet of defendant Thompson, at the time the parties were arrested in the woods near Greensboro, because a matter occurring in the absence of the defendant Hawley and not of the *res gestæ*, and is immaterial and irrelevant. Objection overruled by the court, to which ruling defendant then and there excepted.

I got the card from under Mr. Howard's leg in the woods at the place of the arrest. Shortly after I came up they handcuffed Mr. Howard and Mr. Daley, and they sat down by a large tree, and were sitting there while Mr. Howard tried to put this card under his leg; I lifted his leg up and picked it up and gave it to Sheriff Jordan; there was on it "Henry D. Hawley, Hotel Guilford." I was then deputized to go to town and I went ahead of the sheriff, and Mr.

Weatherly was to hold the prisoners for an hour in the woods. I passed the sheriff and came to town; I sent my horse back by another gentleman and came up the street, and saw Mr. Hawley standing in front of the hotel; he was standing on the left of the door going uptown. I passed by him and took my stand on the other side of the door and at the other window. He had a very nervous appearance; he was twisting his mustache and look-
162 ing up and down the street and seemed to pay no attention to me while I was watching him; he stood there some little time and I saw Sheriff Jordan and Mr. Patterson coming up the street, and as they came up the street I went in the ladies' entrance to the Guilford, and they brought Mr. Hawley in their door, and I followed them. They took him back in the writing-room and read a warrant to him.

21st excep. 21st ex. Here defendants make a motion to strike out all the evidence of the witness relating to his own acts, or of the conduct or appearance of defendant Hawley, subsequent to the arrest of either of the defendants in the woods, as not being of the *res gestæ*, and because it is immaterial and irrelevant. Objection overruled by the court, to which ruling defendants then and there excepted.

Sheriff Jordan asked him if he knew anybody here; he said he did not. I asked the sheriff to give me that card, and asked him if it was his. He said it was not. We then went up to his room. We found two cases there, one a dress-suit case and an assayer's case. When we got in Mr. Hawley's room, Mr. Patterson asked him whose things those were; he said the suit grip was his, as to the case, it belonged to a friend down South, and he asked him if he had the key to it; he said he didn't. Mr. Patterson asked him to give him his keys; he did so, and he unlocked the grip and the case both. They then left the gentleman in the custody of myself. We sat in the room a few minutes; it was rather warm, and I insisted that we go downstairs. We went down in the office, and stood there for a while. We left the office pretty soon. Mr. Hawley said he had taken a little medicine and asked me to go to the toilet-room with him, which I did. There Mr. Hawley reached in his pocket and pulled
163 out this envelope, he tore it half in two. As he did I grabbed him back of the neck. He threw this into the sink and grabbed for the chain. As he did I grabbed him; in the scuffle I secured the letter out of the sink. You can see it has been in the water.

Here the letter marked Exhibit D was read in evidence. It was a typewritten letter to Harry suggesting that he had been reappointed by the United States Government to the position as assistant assayer at the mint at Philadelphia, and signed in typewriting. ——. Witness identifies another letter as being the same found in the assayer's case.

Being cross-examined the witness said:

Cross-exam. Before I went to the place with Mr. Hawley that he requested me to go, I had already

taken this case from his possession; it had been seized by the sheriff and had been opened and the contents examined, not thoroughly examined. These letters were found in the case after it was thoroughly examined. The officer had taken it from the hotel and examined it for whatever was in it. I am not an assayist and will ask Mr. Hawley to explain what an assayer's outfit consists of. While I do not know what an assayer's outfit consists of—the case had scales, acids of different kinds, and also a little bellows; that is all. I understand it is an assayer's outfit—it may be something else. I could take an acid and test gold myself with it.

Witness was then asked the question, "What is exclusively used in an assayer's outfit that is not used in anything else?" when the witness remarked, "I don't know that you could find anything that could not be used for something else." And the court said: "You cannot examine the witness any further on this subject, as the witness has stated that he does not know what constitutes an assayer's outfit."

164 22nd ex. Here counsel for defendants objected to the remarks and ruling of the court as being an
22d excep. expression of opinion prejudicial to the defendants and an undue limitation of their right of testing the witness' knowledge with respect to what the case and its contents were. Objection overruled by the court, to which ruling defendants then and there by their counsel excepted.

The State then called BANKS BOONE as witness, who being sworn testified in substance as follows:

Banks Boone—Direct exam. My name is Banks Boone, I live in Greensboro. I remember the 21st or 22nd of March this year when defendants were arrested. I was in town that day; saw Mr. Hawley. Was then working for Simpson Shields Shoe Company, situated diagonally across the street from the McAdoo hotel; saw him after dinner. I was standing near the door, and the door was shut. There was a gentleman came in the store, said "Good morning," and slammed the door behind him on the inside. I walked up to him and asked him if there was something I could do for him. He said no, he ran in there to dodge a man. He stood around in there a few minutes and I talked with him. I reckon he was in there possibly five minutes, then he turned around, looked over the store and said, "This is a wholesale shoe store, isn't it?" I said, "Yes." He said, "I am a shoe drummer myself." We passed a few words and then he went out.

The State then called HENRY WHITFIELD as a witness, who, being sworn, testified in substance as follows:

Henry Whitfield—Direct exam. My name is Henry Whitfield; I work at the Guilford hotel; was there last March. Remember when defendants were arrested. Saw Daley in the morning and he told me he wanted me to let him

out; that he would be in with a buggy some time that
165 day, and he wanted me to let him out. He went in to dinner; I held the horse for him. He got out, went in the house, got his satchel and came back and got in the buggy and went on out, and told me he would be back between three and four, or five o'clock, and to be there to let him in. I did not notice the satchels particularly when he came out with them; I did not notice what kind they were. That was the usual place for loading the baggage; we generally loaded the grips and smaller pieces at the front of the house. I kept the gate locked. He did not come back the evening he went out; he paid me a quarter. He was stopping at the hotel.

23rd ex. Defendant Hawley, by his counsel, in ample time objects to the testimony of the witness, because it re-
23d excep. lates to conversation between the witness and defendant Daley in the absence of defendant Hawley, and because it is irrelevant and immaterial, and moved to strike out his testimony, which objection and motion was overruled by the court, to which ruling defendant Hawley then and there excepted.

The State then called Dr. TURNER, as witness, who, being sworn, testified in substance as follows:

My name is J. P. Turner; am coroner of Guilford county; reside at Greensboro. I remember to have seen and
J. P. Turner—Di- examined the trunk that Mr. Jordan spoke
rect exam. of yesterday, for which he got a check from defendant Daley, and opened it down at the Hotel Guilford. It was found, I think, on the day following the trial, the preliminary hearing. There was a research made and this check was found, as I understand it, on the person of Gonez Bono. I examined it the same day it was found; the check
166 was turned over to me. This was Saturday, I think, and at the same hotel where he was stopping.

24th ex. Here defendants' counsel objected
24th excep. to the witness testifying with reference to the trunk and its contents found after the arrest and incarceration of defendants, as not being of the *res gestæ*, incompetent, irrelevant and immaterial. Objection overruled, to which ruling of the court, defendants by their counsel then and there excepted.

It was found at the Guilford hotel, where Hawley and Daley were stopping. The trunk was a box arrangement; a strong trunk, well bound with iron, and had on it two locks, one at either end towards the end, not in the middle like an ordinary trunk. I suppose the trunk was about three feet long by eighteen inches wide, and about fifteen inches deep. The inside arrangement was in layers or trays. The first tray contained just simply some of their paraphernalia, I don't remember exactly what, a place built especially, it looked like, for these two cases that contained the gold brick, and there was a board there to wedge in between them so as to make them station

ary so they could not move. In the lower part of the trunk I found quite a number of maps of the Southern States, and some parts of Canada, the eastern part of Canada especially, and also some well-bound copies, parts of copies, of Dun, a part of Bradstreet and Dun; I think this was Dun's part of it, bank reports, reports of the wealth of men throughout the country, and also all the bank officers, and the amount of shares that the different men held in banks. There was also in the bottom of this trunk, in different compartments, for holding this material, bronzing liquid, in fact a bronzing outfit, bronzing liquid and bronzing powders, together with two brushes in good order. Also quite a number of bits like this in
here, like this part of it (showing jury). Some four or five,
167 possibly more, of the new shawl straps you saw around the
second brick that we opened here yesterday; and three or four or more of the oilcloth covers like was around those bricks.

I saw no flannel wrappers or goods in the trunk. There was also some 12 packages of borings, which on being tested proved to be pure gold. I have studied chemistry and am familiar with acids upon metal, and I say it was pure gold. I don't remember anything else in the trunk. The gold was fixed up in nice little paper, colored slightly, not exactly brown; packages 2 or 2½ inches long and 1½ inches wide.

Being cross-examined by Mr. Gilmore the witness said:

Cross-exam.

In the capacity of coroner of Guilford county I handled the writ in the suit of Paul Garrett against J. L. Howard; I served the paper; I levied upon the property belonging to these defendants; by that writ I levied on their baggage and the money they had on their persons, and such other effects as could be found belonging to them; I don't remember the exact amount of money, but I have got it in the bank; it is $300 and some odd dollars, possibly $400. I levied on their baggage. There was some clothing; I levied on one hat and some slippers or shoes; I don't remember which. As nearly as I could I took everything they possessed on their person, everything in the clothing line I suppose. That was just before the trial I believe. I don't remember what day; I don't remember the exact date when I got possession of the writ. I have not the writ with me, it is filed in the clerk's office. I think it was Saturday morning I received the writ, and I executed upon it immediately. I don't think I made a second levy under it
after the preliminary examination. The trunk was given
168 into my custody after the preliminary hearing. I don't
know whether you call it a levy or not, I was sent for to take charge of the trunk, I took it into my custody subject to the preliminary hearing in this case, and I don't know whether or not I levied on the trunk by virtue of that attachment or not; I had no other authority than that attachment writ for doing so. I now claim custody of the trunk on the authority that attachment gave; I don't know what else. I supposed I held it by that attachment. I have the money in the City national bank. It is in my name for them; for the men whose persons it was taken from. I have had the cus-

tody of the Indian outfit since levying upon it by that attachment writ. I have made an exhibition of it since then to a great many people. I have let them see it. I could not tell how many had seen it in my office, too many to remember; one man was dressed up in it with my permission.

Being re-examined in direct by Mr. Brooks.

25th excep. 25th ex. The trunk and contents spoken of by witness were offered in evidence, to which offer the defendants, by their counsel, then and there objected. Objection overruled and exception.

Redirect exam. The trunk being of the description heretofore given and contained therein was: One book, Duns' rating on Tennessee, Louisiana, Mississippi and Missouri; one copy of the American Bank Reporter, printed by Aaron; one copy marked American Bank Reporter, without the printer's name; one pair of wire-cutters; one hand vise; one screw-driver; one pair small pinchers; one 2-foot rule; one 3-cornered file; one pair scales; 17 packages borings, purporting to be gold borings; four squares of oilcloth; 7 shawl straps; quite a number of small bitts; several small brushes; three cans of bronzing liquid; two bottles of bronzing powder; bunch of hand maps of the different Southern States and parts of Canada; quite a number of blanks.

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26th excep. 26th ex. Here defendants moved to strike out all the evidence offered by the State by the trunk and its contents, and as testified to by the witness. Motion being denied, defendants by their counsel then and there except.

The witness proceeding, said: I remember the day defendants were arrested; had seen Hawley and Daley at the hotel. I don't know the day, it was several days before the arrest. Mr. Daley was there the first time, it was a week I think, or close on to that before the arrest. He was there three days and a quarter, or something like that. Paid me his bill, and left, I think, on the 9.55 train, and said he would come back. He came back. The first time he came he brought some baggage with him, a trunk, which was checked and left in the office.

28th excep. 28th ex. Here defendant Hawley, by his counsel, objects to the testimony of the witness, because it relates to conversation and acts between the witness and defendant Daley in the absence of defendant Hawley, is irrelevant and immaterial; which objection was overruled, and defendant Hawley, by his counsel then and there excepts.

I gave him a check for the trunk, and it was put in the hall between the elevator and the back door of the private entrance. It was there from that time up to and including the time of the arrest. During that time Hawley stopped at the hotel. He came there about two or two and a half days, I think, before the arrest; I am not positive about that. He remained there from the time he came until the arrest. The trunk was the only piece of baggage that I saw Daley have. The trunk was delivered to the sheriff; there were two came there after it.

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The morning of the day of the arrest Mr. Harley was put on call for five o'clock. There is a train coming into Greensboro at 5.48, running from Washington to Columbia. One coming from Richmond might readily come on that train. It is a reasonably direct way by Danville from Norfolk. Don't know that prior to then Daley or Hawley met this train, they had never been put on call before. The passenger coach arrived from Raleigh in the morning about 5.15.

Cross-examination by GILMORE:

Recross-examination. I was present in the court-room yesterday and heard the examination in this case.

29th excep. 29th ex. Here counsel for defendants moved to strike out the testimony of the witness, upon the ground that he was in court yesterday and heard the evidence of the witnesses testifying in the case, in violation of the order of the court that excluded all the witnesses from the court-room during the progress of the trial. Motion overruled, and defendants by their counsel then and there excepted.

In examination by Mr. Barringer witness said:

Mr. Hawley came on the 5.48 train for breakfast. He registered his name and I gave him a room to himself; Daley had a room by himself.

Being examined in redirect by Mr. Brooks the witness said:

Re-redirect exam. I think Mr. Daley registered the first time from Roanoke, and from Danville, the second time. I don't think Mr. Daley's room was ever changed. Mr. Hawley's room was. He first occupied
171 No. 43 on the second sleeping floor, and was moved to 20 on the first sleeping floor. Mr. Daley occupied 23 on the first sleeping floor all the time he was there; that put them about three doors from each other across the hall.

The State then produced Prof. JOHN THOMPSON, who being sworn, testified as follows:

John Thompson, direct exam. My name is John Thompson; reside at Greensboro; am a teacher of chemistry at the A. & M. college. Was educated in the University of Minnesota. I specialized chemistry. I am capable of making tests and determining the weight of that bar there. I have made an analysis of the borings taken from these pieces.

Was then asked by the State solicitor this question: "What is the result?"

30 excep. 30th ex. To which question defendants, by their counsel, objected to any evidence tending to show the substance or material which constitutes the alleged gold bricks in evidence in this case, as the same are not of *res gestæ*, are immaterial and irrelevant, Which objection was overruled by the court, and defendants, by their counsel, then and there excepted.

The witness proceeding said: After testing I found them principally copper; I found no presence of gold. One was bored in three places and the other in two.

The gold bricks, and the cloths in which they were bound were offered in evidence, to which offer defendants then and there objected, because they were not *res gestæ*, irrelevant and immaterial, and moved to strike out the testimony of witness relating to them. Which objection and motion by defendants was by the court overruled and denied; to which ruling defendants, by their counsel, then and there duly excepted.

Marion Cobb. Direct exam. 172 The State then called as a witness MARION COBB, who being duly sworn, testified in substance as follows:

My name is Marion Cobb; my father is proprietor of the Hotel Guilford. I remember the occasion in March when these defendants were arrested. Prior to the arrest two of them, Daley and Hawley, stopped at the hotel. I have the hotel register in my hand, beginning in December and ending in April. This is the register in which they registered.

State closes. And which is all the evidence offered by the State to prove its charge against the defendants under the indictment and the several counts thereof.

Motion by defendants for State to elect. State elects to proceed on first count. Here defendants by their counsel, moved the court to require an election by the State on which count in the indictment it will rely for conviction against the defendants. Whereupon the State, by its solicitor, elected to rely upon the first count in the indictment and enter a *nolle prosequi* to the second and third count of the indictment, the other counts to be referred to as furnishing particulars. Which being done and entered by the court in the said cause, the defendants moved the court to instruct the jury that upon the evidence adduced in this case, the defendants as a matter of law are not guilty and the jury should so find and return their verdict accordingly. Which motion of the defendants the court overruled, to which ruling of the court the defendants then and there excepted.

Defense declines to offer any witnesses. 31st excep. 31st ex. That thereupon the defendants offered no witnesses or evidence in the cause and at the conclusion of the evidence and before the argument of counsel was begun, the defendants asked in writing the following special instructions:

173 *Instr. Prayed by Defense.*

"STATE OF NORTH CAROLINA,
Guilford County.

In the Superior Court, June Term, 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Prayers for Instructions.

At the conclusion of the evidence the defendants asked in writing the following special instructions:

I.

"To constitute an indictable conspiracy there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. This definition of the conspiracy being applied to the case now before the jury means that the conspiracy alleged to have been entered into by the defendants, must have been done with the intent either to cheat or defraud or to rob an innocent person, who did not know of its existence, of his property, or to deprive an innocent person of his lawful right; so that if the jury find that Paul Garrett, the party whom it is charged in the bill of indictment the defendants conspired to cheat or rob of his property, entered into the contract as alleged with Howard with the knowledge or belief on his part that it was a fraud that was attempted to be perpetrated upon
him, then I charge you that he is not such an innocent per-
174 son as is contemplated by law, and the defendants would not
be guilty even although the alleged combination was to cheat or defraud Paul Garrett.

II.

"The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment herein consists in its criminality under the law in the means alleged to have been agreed to be employed by the defendants in the obtaining of the money of one Paul Garrett, and that as to such count it devolves upon the State in the first instance to prove by the evidence beyond a reasonable doubt that the defendants had actually agreed between themselves upon the means charged in said count to obtain of the witness Garrett his money, that is, secretly and with deceit and fraudulent intent and by false pretenses, subtle means and devices of a subsisting fact, the truth of which was unknown to the witness Garrett and which was intended to and capable of deceiving a person of ordinary prudence, exercising at the time ordinary care; and

unless you so find and believe from the evidence in this case you shall acquit the defendants.

III.

"The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment consists in its criminality under the law in the means therein alleged by the State to have been agreed upon by the defendants whereby to obtain the money of one Paul Garrett, and that in such case the burden is upon the State to prove beyond a reasonable doubt every essential element of the offence thus charged against the defendants, and show that the means there charged were actually agreed to be em-
175 ployed by the defendants as a means of obtaining from the witness, Paul Garrett, his money with the intent wickedly and maliciously to defraud him of it; and unless you find from the evidence that such was the agreement between the defendants so to cheat and defraud the witness, Paul Garrett, of his money, then you will find the defendants not guilty; and the jury are further instructed that in considering the evidence adduced before you by the State in this cause as applicable to the first count of said indictment, you should take into consideration the situation of the parties, their acquaintance with each other, of the probability or improbability of the story related by the defendant Howard to the witness Garrett at Weldon, the impression, if any, it made upon his mind, the assent of Garrett thereto and his knowledge of the scope and effect of the agreement assented to, and its nature and his participation therein, and if from such impression he was likely to be or was deceived thereby into the belief of the truth thereof, and whether the same was calculated to and capable of inducing him to part with his money to the defendants; and if you find from the evidence that such story as was then related by Howard to Garrett, that he in the exercise of ordinary prudence should have known or did know, was false, and that knowing its falsity he then and thereafter encouraged by his words and conduct the defendant Howard to believe that he, Garrett, believed in such story, and on such pretense advised and encouraged the defendant, Howard, into taking further steps of an apparent attempt to obtain the money of Garrett by and through the means suggested in the story related to him by the defendant Howard, and that in pursuance of such statements and requests by Garrett the defendant Howard came to the city of Greensboro in Guilford county and prepared himself with his co-
176 defendant, A. L. Daley, to show the witness Garrett the property in question and under inducements laid and held out by Garrett to the defendant Howard did transmit to him, Garrett, a telegram prepared and written by the witness Garrett addressed to himself, whereupon the witness Garrett came to Greensboro, and with the defendant Howard went to see the property so situated and described to him; and that arriving at the place where the defendant Daley, disguised as an Indian, and the property so spoken of, was, and that while weighing and examining it, the witness and a sheriff's posse arrested the defendants Howard and Daley; in that

event the court instructs you as a matter of law that the confederation or agreement between the defendants to so exhibit to him the said property was not an unlawful or criminal conspiracy, and this without respect as to what motive the defendants had or may have had in so arranging to exhibit to the witness Garrett the property in question, and that the acts, conduct and agreement of the defendants in this respect was not criminal under the law, and you should find them 'not guilty.'

IV.

"The court instructs the jury that if you find from the evidence that about March 20th, 1901, the defendant Howard called upon the witness Garrett at his place of business in the town of Weldon and related to him a story respecting his, the defendant Howard's, ownership of a mining property and gold taken therefrom, and of the relationship of a former partner by the name of Garrett whom he was seeking for the purpose of enlisting him in the business of developing said mining property, and disposing of the
177 product thereof, then stated to be in the possession of an Indian at the time being in the city of Greensboro, and that from the relating of such story by the defendant Howard, the witness Garrett either knew, or in the exercise of ordinary care, precaution and prudence might or should have known, the same was false and related to him for the purpose of obtaining and defrauding him of his money, and that knowing or believing it at the time to be so, he, the witness Garrett, falsely pretended belief of and confidence in, the story so related to him, and that it was intended to cheat and defraud him of his money, and that so believing he, Garrett, encouraged and advised the defendant Howard in taking further steps with respect to developing such plot as was disclosed in the story related by Howard to the witness Garrett, and that Garrett aided the defendant Howard in arranging the details and creating the situation of exhibiting to the witness Garrett the property in question at or near the city of Greensboro; the court instruct- you as a matter of law that nothing said or done or agreement entered into by or between any two or more of the defendants pertaining to the proposed transaction with the witness Garrett subsequent to his knowledge or belief in the falsity of the story related to him by Howard, are acts and agreements between the parties of which the witness Garrett may in law not be heard to complain, and that the transaction which occurred subsequent thereto concerning which the witness Garrett had participated in arranging for, was not criminal; and this irrespective of what was or might have been the intention or motive between the defendants in carrying out the details of such arrangements or the representations subsequently made to him by any one or more of the defendants with respect to the
178 quality or the condition of the property in question or what they intended to do with the same, and you should find the defendants 'not guilty.'

V.

"The jury are instructed that if they find from the evidence in the case that at the time the witness Garrett was approached by the defendant Howard at Weldon or during the conversation and transaction there had between them the witness Garrett then and there became satisfied and knew that the defendant Howard was proposing to him a scheme which was patently and evidently a fraud and a sham, and that knowing this to be true the said witness Garrett, for the purpose of gain, or taking his chances upon making money out of such scheme and plan as then proposed by the said defendant Howard, willingly and voluntarily entered into the same for such purpose and encouraging or in any way furthering the said enterprise, scheme or plan so known to him to be false and fraudulent, and then and there in any way directed or advised the said Howard how to proceed, or agreed to accept the proposition then and there advanced and proposed by the defendant Howard to him, the said Garrett, and undertook and agreed to become interested therein as a partner or shareholder for the purpose of furthering the said enterprise, scheme or plan with the hope of gain to himself, and that the said Howard then and there distinctly told the said Garrett that the object of the said enterprise, plan, or scheme did not contemplate the advancement, contribution or investment of any money whatever by the said Garrett, but that all he, the said Garrett was expected to do in connection with the said enterprise, scheme or plan, was that
179 he, the said Garrett, should manage and direct the same, and that the said Garrett with all these facts before him willingly and voluntarily assented thereto and advised the said Howard how he should further proceed in the matter, and that Howard, thereafter acting in obedience to the suggestions of the said Garrett, came to Greensboro and while here and promising him full compensation for his services while engaged in the furtherance of the said enterprise, scheme or plan, and that the said Garrett, as a matter of fact, was never cheated or defrauded or robbed of a cent by the defendants or any one of them, but in the furtherance of the said scheme or plan, he, the said Garrett, had accepted the money of the said Howard to cover the expenses of his said trip to Greensboro in furtherance of said plan or scheme, then and in that event there would be no criminal conspiracy as charged in the indictment, but the defendants as a matter of law would not be guilty and it is the duty of the jury so to find.

VI.

"If the jury should find from the evidence, that the prosecuting witness, Paul Garrett, in pursuance of an arrangement voluntarily entered into by him with the defendant Howard at Weldon, came to the city of Greensboro in the furtherance of an enterprise the details of which were fully made known to him by the said Howard at Weldon, and assented to by the said Garrett, and out of which the said Garrett was to receive compensation equal to that of the said Howard and his copartner, A. L. Daley, and that the expenses

of the said Garrett were paid in advance, and it was further made known to him at Weldon and at Greensboro after his arrival here, that no money was expected from him, but he was simply to take charge of the business and manage it, as one possessing superior intelligence and capacity, and that he gave his full and free assent to the same, and that upon his arrival in Greensboro, he, and the said Howard, in pursuance of their previous arrangements and agreements, repaired to the place where the property in question was to be exhibited for the purpose of allowing the said Garrett to inspect it, and in accordance with the terms of the said agreement as aforesaid made known to him, the said Garrett, at Weldon, and that in furtherance of the said plan and agreement, Howard and the said witness Garrett proceeded to the inspection of the property in question, and that while they were therein engaged the defendants Howard and Daley were interrupted, interfered with and arrested before the said inspection was completed in accordance with the agreement heretofore made between the said Howard and Garrett, which interruption and arrest was instigated by the said Garrett and planned and concocted by him before he left the town of Weldon and for the mere purpose of trapping the defendants, then and in that event the said agreement would not be a criminal conspiracy, and the jury should find the defendants 'not guilty.'

VII.

"The court instructs the jury that, although you may find from the evidence that the defendants actually came together and in terms agreed to obtain of Paul Garrett his money by false pretenses and to cheat and defraud him, yet if you further find from the evidence that when the false statements and pretenses were made by the defendants to the witness Garrett they were such as he knew at the time to be false or by the exercise of ordinary care and prudence should have known to be false, and with such notice and knowledge on his part he assented to the requests and demands of the defendants in the hope of profiting himself thereby, then you will find that the transaction as between the parties was lawful and the defendants not guilty, under either count of the indictment.

VIII.

"The jury are instructed that it is not unlawful for two or more parties to come to terms of agreement between themselves to interest and enlist with them another person in the conduct and furtherance of their business or undertaking; or, if such other person has explained to him and understands the means and process to be used in the accomplishment of the proposition in which he is about to engage, and assents to, and assumes the chances of gain to himself, in engaging with such others in the furtherance of such enterprise, then there is no such false or fraudulent representations or statements made to him as will constitute the offense of conspiracy to cheat and defraud him of his money or property; and if you find from the evidence that the defendant Howard explained to the witness Gar-

rett a scheme which he proposed to Garrett to assist in the furtherance of, and to which scheme the witness Garrett then gave his assent and approval, undertook and agreed upon terms of compensation then proposed to him, to engage in the furtherance of, in connection with Howard, and the said defendants, in the hope thereby of gain and profit to himself, then you will find the defendants 'not guilty.'

IX.

"The court instructs the jury as a matter of law that it is not unlawful or criminal for two or more persons to come to terms
182 and agree together to interest and induce another person to become interested and promote conjointly with them any matter or thing not in itself unlawful, and if you find therefore from the evidence that the defendants, through the defendant Howard, represented and proposed to the witness Garrett a scheme, project or business which as explained was apparently lawful and proposed to engage the services of the witness Garrett in the promotion and furtherance thereof upon terms profitable to the said Garrett that they had a lawful right to do so, and if you further find from the evidence that the said Garrett gave his voluntary and free assent to the promotion and carrying out of the project for business thus proposed to him, you will find the defendants 'not guilty.'

X.

"The jury are instructed that it is not unlawful for two or more persons to agree together to interest with them another person in the promotion and carrying out of any enterprise of advantage and profit to such person or to hire such other person on terms of compensation to assist them in the transaction of business, and if you therefore find from the evidence that two or more of the defendants explained to the witness Garrett the nature of the business in which they desired his services, and that fully understanding the matter, the witness Garrett undertook and agreed to serve the defendants in the promotion and furtherance of the enterprise and business thus explained to him upon terms of profit and advantage to himself, then, as a matter of law, he had a right so to contract, and in doing so assumed all the risks and burdens incident to such contract, and if you so find and believe from the evidence in this case, you shall find the defendant 'not guilty.'

183 XI.

"The court instructs the jury that if you find from the evidence that the witness Garrett had explained to him by any one of the defendants the nature and object of the business they were intending to promote regarding which they sought and desired his services, and that having the matter so explained to him, he undertook and agreed upon terms of advantage and profit to himself to join the enterprise, business or undertaking of the defendants, and which was thus explained to him, then you will find, as a matter of law, that the defendants had a perfect right so to interest and engage with

them the witness Garrett in its furtherance and promotion, and that if he came to terms and agreed with any one or more of the defendants to become so interested with them in the promotion and furtherance of their enterprise, that as a matter of law, he had a right so to do, and they had a right to so engage him and that he with them assumed and undertook all the hazard and chances of the future of such enterprise, and you should therefore find the defendants 'not guilty.'

XII.

"The jury are instructed, as a matter of law, that parties have a right to seek each other out, contract and agree with each other with respect to any business or undertaking looking to the mutual betterment of their condition; and if you therefore find from the evidence that any one or more of the defendants sought out and explained to the witness Garrett the nature of the business in which they desired his assistance to promote and upon the same being explained to him the witness Garrett assented thereto,
184 and agreed in the hope of profit to himself to embark therein and join one or more of the defendants in the promotion thereof, then you will find, as a matter of law, that the transaction between the parties was lawful, and you should find the defendants 'not guilty.'

XIII.

"The indictment in this case charges the defendants with a conspiracy to falsely cheat and defraud Paul Garrett out of his money by what is known to the law as 'false pretense,' and a false pretense is a false representation by one person to another of a subsisting fact which is calculated to deceive the person to whom the representation is made, and which actually does deceive him, in consequence of which deceit he parts with his property, so that before the jury can convict them they must find the fact to be that the defendants fraudulently combined and conspired with each other to make a false representation of some subsisting fact to Paul Garrett, the falseness of which was unknown to Paul Garrett, and which Paul Garrett believed to be true, and in case you do not find this to be the fact it will be your duty to return a verdict of 'not guilty.'

XIV.

"The defendants are presumed to be innocent of all the charges against them until they are proven guilty by evidence which satisfies you beyond a reasonable doubt of their guilt; and this presumption of innocence is raised by law in their favor and is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the defendants are entitled.
185 "This presumption of innocence is evidence in favor of the defendants introduced by the law itself in their behalf and it continues in their favor until the end, unless it is overcome by such competent proof as satisfies the jury beyond a reasonable doubt of the defendants' guilt.

"Unless, therefore, this presumption of the defendants' innocence, which is evidence introduced by the law in their behalf in this case and which must be considered by the jury as evidence of their innocence, is overcome by competent proof which establishes the defendants' guilt in that degree and to that extent which removes from the mind of the jury all reasonable doubt of their guilt, it will be the duty of the jury to return a verdict of 'not guilty.'

XVII.

"As to a reasonable doubt, the court instructs you that in this particular case, if upon considering all the evidence, you can say that in their acts and doings as found by you, the defendants were actuated by any other motive than to cheat or defraud Paul Garrett, and to obtain from him any money or other thing of value, as for example, if their object and intention was to induce Paul Garrett to join in with them in an effort to cheat or defraud some one else then it would be your duty to adopt that theory or that motive and that would be a reasonable doubt, and it would be your duty to return a verdict of 'not guilty,' and in passing upon this question it is proper that you should consider, if you find the facts so to be, that the defendants never asked Paul Garrett to advance any money; that Howard paid his expenses to come to Greensboro; that Howard told him that he would pay his expenses to go to Philadelphia and attend to their business for them and would share with him any profits that they might make.

186 XVIII.

"If the jury shall not have removed from their minds all reasonable doubt of the defendants' wrongful and unlawful intent to cheat and defraud Paul Garrett by reason of such acts and things done by them, then it would be the duty of the jury to return a verdict of 'not guilty.'

XIX.

"While it is not necessary, in order to convict the defendants in this case, that they should have actually obtained from Paul Garrett any money or other thing of value by false and fraudulent representations, still before the jury can convict, they must be satisfied beyond a reasonable doubt, as above explained, that there was an unlawful conspiracy and agreement between the defendants to endeavor by false and fraudulent representations to obtain money from him, and the jury must further find that the false and fraudulent representations agreed to be used by the defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett.

XX.

"A mere false affirmation of the value of any article is not indictable and the pretense to be criminally false, must be of a past or subsisting fact, capable of deceiving a person of ordinary caution or

prudence; so that your inquiry will be, was Paul Garrett a man of ordinary caution and prudence, such as the representation of Howard was capable of deceiving; and in passing upon this question
187 it is your duty to consider whether it did deceive him; consider his demeanor on the witness stand; his telegram to the chief of police in Richmond; his letter to Patterson; the fact that he admits he sent Mims to Greensboro before he came himself; his instructions to Mims, and his conversation with Patterson after his arrival in Greensboro; the fact that he says he was satisfied Patterson and Mims would be at the meeting place between him and the defendants Howard and Daley for his protection; and the fact that he testifies that as Howard left his office in Weldon he told his clerks to look out of the window if they wanted to see a gold-brick man.

XXI.

"If the jury shall find from the evidence, at the time Paul Garrett agreed with Howard in Weldon to attend to the business for him and his alleged partner of selling their gold and aiding him in the purchase of machinery to work the mine, he knew or had reason to believe that a fraud was intended, and he came to Greensboro ostensibly to further that fraud, but really for the purpose of trapping the defendants that he might have them arrested and that he was not defrauded or cheated out of any money or other thing of value by the defendants or by the false representations agreed to be made by them, then the court instructs you that no crime has been committed and it will be your duty to return a verdict of 'not guilty,' and in passing upon the question of the contract and agreement between Howard and Garrett, it is your duty to consider the two telegrams which were written by Garrett himself and given by him to Howard to be sent back to him (Garrett) and also to consider the fact that Howard gave Garrett $10 and agreed to pay all expenses which that
188 sum did not cover; and in passing upon the question of the knowledge and belief of Garrett, you will consider the telegram sent by him to the chief of police in Richmond and the letter written by him to the attorney general in Richmond, and the letter written by him to A. C. Patterson, and the sending by him of a Mr. Mims of Weldon to Greensboro, and such other acts done by him looking to the apprehension and arrest of the defendants.

XXII.

"The court further instructs the jury that upon the evidence adduced in this case the defendants, as a matter of law, are not guilty, and the jury should so find, and return their verdict accordingly."

32nd ex. That each and every of the several said special instructions asked by the defendants, excepting the
32d excep. eighteenth (XVIII) thereof was refused by the court as asked, except as given in the general charge, to which refusal and action of the court in not giving the same to the jury the defendants then and there duly objected and then and there took and saved their exception.

The defendants then and there also objected to the court's failure to give to the jury each and every one of the said special instructions as asked, and to note on each thereof the reasons for giving or refusing the same, which objection by defendants was overruled by the court, to which ruling defendants then and there duly excepted.

33rd ex.

The defendants then and there objected to the court's refusal to give instruction No. XIV as asked by defendants and by eliminating therefrom the words

189 "and is to be regarded by the jury in this case as a matter of evidence to the benefits of which the defendants are entitled,"

and in giving said instructions so modified; which objection was overruled by the court, to which ruling of the court defendants then and there excepted.

34th ex.

And defendants then and there also objected to the court's action in eliminating from instruction XIX, as asked by the defendants, the words, "and the jury must further find that the false and fraudulent representation agreed to be used by defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett," and in giving the same so modified. Which objection was overruled by the court, to which ruling defendants then and there excepted.

35th ex.

That at the conclusion of the argument and over the objection of the defendants, the court gave to the jury his instructions and charge of law as follows, to wit:

"*Charge by Court.*

"NORTH CAROLINA, *Guilford County.*

"STATE
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley. } Judge's Charge.

"Gentlemen of the jury:

"The prisoners are on trial upon an indictment in which they are charged with a conspiracy to cheat and defraud one Paul
190 Garrett, a citizen of your State out of his monies, goods and wares. To this indictment the prisoners have pleaded 'Not guilty,' and thus an issue has been raised between the State and the prisoners as to their guilt or innocence, or the guilt or innocence of either of them.

"During the course of this trial much has been said to you by counsel for the State and for the defendants as to the law that should govern the trial of the case and they have read extensively from

legal authorities to you commenting upon the same and giving their views of the law applicable to this case. As you have observed, and to which the court again calls your attention, there seems to be an irreconcilable conflict of opinion as to most of the views presented and insisted upon by counsel representing the respective sides of this controversy; that is to say, between counsel for the State, and those for the defendants. This being so it becomes my duty to say to you that however much you may have been impressed with the views of any of the attorneys in the case either for the State or the defendants, as to the law which should govern this trial still you are to take the law governing it and upon which your verdict is to be founded from the court. Where the views of counsel for the State or for the defendants conform to the views of the court, the jury can adopt them, but where in conflict with the views of the court the jury should disregard them and be governed by the instructions of the court. This is not only your sworn duty, gentlemen, but it is the safest course to pursue if you are moved by a conscientious desire to respond to the high duty of jurymen, as I feel sure you do. By pursuing this course no possible wrong can be done the defendants as an error committed by the court in instructing you upon the law of this case can, if the defendants feel
191 aggrieved thereby, be corrected on appeal to our supreme court. Now, gentlemen, observing the instructions that you will take the law governing this trial from the court, let us come to the consideration of the charge against the defendants, that of a conspiracy to cheat and defraud Paul Garrett of his monies, goods and wares, as alleged in the bill of indictment. Conspiracy, gentlemen, is no new offense under the law. Its existence can be traced back centuries prior to our Independence and such eminent ancient law-writers as Coke and Hawk and others refer in their works to the existence of this crime prior to the passage of the statute 33, Edward 1st, de conspiratoribus, which statute has been commented upon by counsel for the defendants. Law-writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act leaving the common law as applicable to all other forms of conspiracy known to the law. Not only *has* the courts of England acted upon this interpretation of the law, but every State in this Union where the common law prevails, so far as the court is advised, has acted upon and upheld this interpretation of the law of conspiracy. To do otherwise in States that rely upon the common law and which have no statute broad enough to cover all forms of conspiracy would be to say that many objectionable and dangerous conspiracies could be formed and their ends consummated, and yet the law be impotent and powerless to prevent or punish such. The correctness or incorrectness of these general views as to the law of conspiracy, however, does not effect the law of this State on the subject for interpreted as it has been by the highest courts for nearly or quite a century we know that a criminal conspiracy is indictable in this State as a common-law offense. Then acting upon this
192 view of the law let us inquire as to what constitutes a criminal or indictable conspiracy under the laws of this State.

"'To constitute an indictable conspiracy under the law of this State there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.' You will observe from this definition which I have given you of conspiracy that the offense consists of the unlawful combination of the conspirators, and that the crime is completed when this is shown. Hence, if two or more persons combine to rob or to cheat another, and this fact can be established the offense is complete and the fact that the consummation of the end in view is never effected is no defense to the charge, the carrying out of the purpose only being in the nature of an aggravation of the crime.

"This, gentlemen, brings us to the immediate consideration of the charge against the defendants as preferred in the bill of indictment; that is, did the defendants named in the indictment or any two of them combine and conspire to cheat and defraud Paul Garrett out of his money or property as alleged in the indictment, if so, then such as so conspired are 'guilty,' and this is so, although the purpose in view at the time of the formation of the combination was never carried out or consummated. The defendants have pleaded to this indictment and say that they are 'not guilty,' and that upon the evidence offered by the State they are entitled to an acquittal at your hands.

"To enable you to correctly and intelligently determine this issue, it is proper that I should instruct you as to some rules of law
193 as to the application of evidence in cases of this nature. Where the State asks a conviction of any one charged with the commission of crime it must satisfy the jury from the evidence in the case of the guilt of the accused beyond a reasonable doubt, and if it fails to do so the jury should acquit, but if the evidence so satisfies then the jury should convict; this rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants or any two of them beyond a reasonable doubt, then your verdict should be 'guilty,' as to such, naming them; otherwise if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or as has perhaps been more aptly expressed by our supreme court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the court in this case say whether or not you are satisfied beyond a reasonable doubt of the guilt of the defendants or any two of them, and if so, your verdict as to such

should be guilty, naming them; otherwise, if not so satisfied, that is 'not guilty' as to any or all of the defendants, as you may find.

"Indictable conspiracies from their very nature are generally formed secretly, and it is therefore difficult to prove their
194 existence by direct evidence. The law, therefore, allows the proof of such offenses to be shown from circumstantial evidence, and from the acts and declarations of the conspirators, where there is proof of the combination or conspiracy.

"It is a rule of law well established that all who engage in a conspiracy, as well as those who participate after it is formed as those with whom it originates, are equally liable and the acts and declarations of each in furtherance of the common illegal design are admissible against all. Every one who enters into a design, in other words a conspiracy, is equally deemed in law a party to every act which may afterwards be done by any of the others in furtherance of such common design. Take all the facts and circumstances disclosed by the evidence and if they satisfy you beyond a reasonable doubt of the existence of the conspiracy charged against the defendants or any two of them then the act of any one of them is the act of all, and of each of the conspirators.

"Now, gentlemen, does the evidence in this case satisfy you by the rule that I have heretofore announced of the guilt of the defendants or any two of them? If so, your verdict will be 'guilty,' as to such, naming them. Much has been said during the course of this trial as to what is an indictable conspiracy and what is not an indictable conspiracy. I have defined to you what constitutes an indictable conspiracy and you will readily understand that such is not the ordinary business combination agreed upon and entered into by persons for legitimate ends and aims. A combination of men for the purpose of doing any kind of business authorized and permitted under the laws does not constitute an indictable
195 offense, but such combinations are highly useful and are protected and encouraged by the law.

"Reference has been made by counsel for the defense to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence as disclosed by the testimony of Garrett satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime his course is

not only proper but is commendable. If he came under the impression that the business transaction was a legitimate and honest one by means of which he would be able to acquire legitimate and honest profit then he had a right to come for such purpose, and it would not be a subject of criticism.

"Now, gentlemen, in the trial of this cause the court admonishes you to divest yourselves of any possible feeling or prejudice which you might have against the defendants as well as any sym-
196 pathy that you might entertain for them on account of their misfortune, and try this case upon the law and the evidence as the court has endeavored to lay it down to you. When you do this you have responded to the high responsibilities which rest upon you as jurors. It matters not whether your verdict accords with public sentiment or not. You are supposed to be indifferent to any such influences and for such to influence you would be a failure to perform your duty. I need not say to you that the offense with which the defendants are charged is a grave one under the law, and if guilty they should be convicted, but while this is true they are entitled under the constitution and laws of your State to a fair and honest trial at your hands, and I feel sure that you will give them such. Reason together, gentlemen, in the spirit of men who are acting upon their oaths to arrive at a just and fair verdict. Guard yourselves against any disposition to act with stubbornness one against the other in arriving at a verdict, and thus you will be the better enabled to arrive at a just and fair verdict. If you find the defendants 'guilty,' then in response to the inquiry from the clerk as to what is your verdict you will say 'guilty,' as to all the defendants or as to any two of them, or you will say 'not guilty,' — to all of them or any one of them. In the event that you should find only two of the defendants 'guilty,' in response to your verdict you should designate them by name as appears in the bill of indictment.

"You will now retire and give the case such consideration as it deserves, and when you have arrived at a verdict you will come back into the court-room, and the court will be prepared to receive you.

(Signed) "COUNCIL JUDGE."

36th excep. 197 36th ex. To which instruction and charge of law by the court so given in writing to the jury, the defendants then and there duly excepted.

Verdict of guilty. The jury thereupon retired and returned its verdict of "guilty" against all three of the defendants.

37th ex. The defendants thereupon moved to set the verdict of the jury aside and for a new trial in said
37th excep. cause, which motion of the defendants was
Motion new trial. then and there overruled by the court, to which ruling of the court defendants then and there, by their counsel, duly excepted.

The defendants thereupon moved the court in arrest of judgment

upon the verdict, which motion in arrest the court then and there overruled; to which ruling of the court the defendants then and there excepted.

38th excep. Motion in arrest. Sentence.

The court thereupon sentenced J. J. Howard, alias Frank Thompson, to imprisonment in the State penitentiary for ten (10) years; H. D. Hawley, to imprisonment in the State penitentiary for ten (10) years, and A. L. Daley, alias Gonez Bono, to imprisonment in the State penitentiary for seven (7) years to which ruling of the court and sentence, the defendants, by their counsel, then and there objected.

39th excep. 39th ex. The objection was overruled by the court and the defendants excepted.

The defendants, by their counsel, then and there prayed an appeal from the said judgment to the supreme court of North Carolina. Notice of appeal was given and accepted in open court and an appeal bond in the sum of fifty dollars ($50) was adjudged sufficient, and the defendant J. L. Howard held in a bond of five thousand dollars ($5,000), the defendant H. D. Hawley held in a bond of five thousand dollars ($5,000), the defendant Daley in a bond of three thousand dollars ($3,000), pending the appeal. The defendants then filed the affidavit set out in the record proper, as required by section 1235, and his honor granted the order set out in the record proper allowing the defendants to appeal *in forma pauperis*.

Prayer for appeal bond.

Bond in appeal.

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Fifty days to defds. and thirty to solicitor for appeal.

By consent the defendants were allowed fifty (50) days within which to prepare their case on appeal and the solicitor for the State allowed thirty (30) days thereafter in which to prepare his counter-statement.

The defendants objected to the bond fixed by the court for their appearance pending their appeal, upon the ground that it was excessive and unreasonable and duly excepted to the overruling of said objection.

Stipulation for record. Leave defds. appeal as poor persons.

It is agreed that the foregoing statement of the case shall constitute the case on appeal to the supreme court. The clerk will send up the judgment and sentence of the court, the affidavit of defendants for appeal *in forma pauperis* and the order of the court granting such appeal and all other parts of the record not embraced in this statement, including bill of indictment and endorsements thereon.

A. L. BROOKS, *Solicitor.*
L. A. GILMORE,
BYNUM & BYNUM,
JOHN A. BARINGER,
Attorneys for Defendants.

199 *Assignments of Error.*

STATE OF NORTH CAROLINA,
Guilford County.

In the Superior Court, June Term, 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley. } Assignment of Errors.

Come now J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, appellants, in connection with their appeal and make the following assignment of errors, which they aver occurred upon the trial of the said cause, to wit:

I.

The court erred in refusing the motion of the defendants that the prosecution be required to furnish them a bill of particulars as set out in their motion.

II.

The court erred in overruling the motion of the defendants, which appears in the record, to quash the indictment:

1. Because the said indictment and matters therein contained are not sufficient in law to warrant the judgment against them or to warrant a conviction of them of any crime.

2. The allegations in the indictment and every count thereof do not constitute a crime under the ordinance of conspirators
200 made and enacted by King Edward the First and his counsel in the 33rd year A. D. 1305 of his reign, or by any statutes of England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense.

3. Because the allegations in the said indictment and in each and every count thereof do not constitute a crime under the statute of North Carolina in force at the date of the said alleged offense.

4. Because the common law with respect to conspiracies has been abrogated by its constitution and legislative enactments on the subject of conspiracy, to wit, the acts of 1868 and 1879, the Code of 1883, sections 974 and 1107, by neither of which said acts is the crime charged cognizable.

5. Because the alleged warrant upon which the defendants were arrested and held for their appearance at the June term of said court, as well as the indictment against them in this action, do not constitute due process of law within the meaning of the 14th article of the amendment to the Constitution of the United States.

6. Because the alleged crime sought to be charged against the de-

fendants under the indictment is not cognizable or punishable, either under the common law or the statutes of North Carolina.

7. Because, there being no statute of the State of North Carolina nor any common law in force therein, authorizing the indictment or denouncing punishment for the said alleged crime, the indictment, arrest, trial, conviction and punishment of the defendants is contrary to the 14th article of amendment to the Constitution of the United States, in this that it is not due process of law; it denies the defendants the equal protection of the laws and abridges
201 their privileges and immunities as citizens of the United States, the defendants being citizens thereof.

8. Because the said indictment and every count thereof is insufficient in this: That the first count thereof does not inform the defendants of the nature and cause of the accusation against them; that the certain pretenses, subtle means and devices are not therein set out and described; nor the cheat or fraud described; nor the amount of the money intended to be obtained or the value thereof; nor what the goods and chattels were or that they were of any value. That the second count thereof does not inform the defendants of the nature and the cause of the accusation against them nor state or show sufficient facts as means or ends to constitute a crime; and that the third count thereof does not inform the defendants of the nature and cause of the accusation against them, nor what the intended cheat and fraud was, nor the amount of the money so intended to be obtained, nor that it was of any value, nor what the goods, chattels or property were, nor the amount thereof, or that they were of any value, nor state or show sufficient facts as means or end to constitute a crime.

9. Because the said indictment and each and every count thereof are otherwise so informal and general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution.

III.

The court erred to the prejudice and injury of the defendants by the remarks of his honor when he refused to exclude the witness Garrett and the sheriff of the county from the court-room on motion of the defendants to separate the witnesses, in that his honor
202 said in the presence of the jury that he "would not exclude from the court-room either the high sheriff of the county or his assistant deputy sheriff, or the prosecuting witness Garrett. That it was a matter that appealed to the discretion of the court and that the high character of the citizens involved forbade the idea that either would be influenced by the testimony of the other." These remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room in the jury-box.

IV.

The court erred in permitting the witness Garrett to testify as to transactions and conversations with the defendant Howard in Wel-

don, Halifax county, N. C., March 20, 1901, and to Howard's declarations in the absence of the other two defendants before the conspiracy had been established as set forth in the 4th and 5th exceptions.

V.

The court erred in further admitting the testimony of the witness Garrett as to the conversation between him and the defendant Howard, alias Thompson, in Weldon, Halifax county, N. C., and with respect to the gold mine owned or supposed to be owned by the said defendant Howard, alias Thompson, or about its supposed product, or concerning the alleged Indian in the woods, etc., the said witness Garrett having immediately theretofore testified as follows concerning the said conversation with Howard: "I walked into the office as he (Howard) turned the corner and I touched the two young men on the shoulder. I did not want the stenographer to hear. I said,
'If you want to see a genuine gold-brick man, look out of
203 the window, quick;' they both ran to the window and I said,
'If he is not one I never saw one.' I rang the 'phone and called up the revenue officer at Littleton, N. C., whom I know personally, and under the suspicion that the bill I had received from Howard was a counterfeit bill, I told him I would like to have him come down that afternoon on the next train; I wanted to see him on a matter of importance. Thompson was then crossing the bridge."

VI.

The court erred in permitting the witness Garrett to testify as to the package or the contents of the package which the defendant Howard offered to show the witness in the woods near Greensboro at the time the defendants Howard and Daley were arrested, and to the reception in evidence of the said package and its contents.

VII.

The court erred in further permitting the witness Garrett to testify as to the acts, declarations and conduct of the defendants Howard and Daley after they had been arrested in the woods by Patterson, Jordan and their posse.

VIII.

The court erred in permitting the witness Garrett to testify as to the acts and declarations of the defendant Howard at and after the time of his arrest in the woods near Greensboro, when Garrett and Officer Patterson and others had him handcuffed and covered with their guns.

IX.

The court erred in permitting the witness Garrett to testify as to what Officer Patterson did to the defendant Daley at and after
204 the time of his arrest in the woods near Greensboro, and to the introduction of a card alleged to bear the name of the

defendant Hawley, and to the fact that the said card was found by the witness Daniel on the ground near the feet of Howard after the arrest.

XI.

The court erred in permitting the witness Garrett to testify on cross-examination as to what occurred in the woods near Greensboro after the arrest of the defendants Howard and Daley.

XII.

The court erred in refusing to strike out the evidence of the witness Garrett as to the cases alleged to have been found in the woods near the defendants Howard and Daley at the time of their arrest.

XIII.

The court erred in permitting the witness Garrett to testify as to what they found in the defendant Hawley's possession in the Guilford hotel in Greensboro or what was said to him by the sheriff or any one of the witnesses present in the room in the hotel while under arrest.

XIV.

The court erred in refusing to strike out and exclude all the evidence of the witness Garrett as to the acts and disclosures of, or conversations with, any one of the defendants in the absence of the others, and any and all evidence of the said Garrett relative
205 to the property belonging to any one or more of the defendants, which was by the witness discovered and investigated subsequent to the arrest of the defendants in the woods near Greensboro.

XV.

The court erred in permitting the witness W. J. Weatherly to testify as to what was said and done by him and the other members of the posse and the defendants Howard and Daley subsequent to the arrest of the defendants Howard and Daley in the woods near Greensboro.

XVI.

The court erred in permitting the witness Garland Daniel to testify as to a card found at the feet of the defendant Howard, alias Thompson, at the time the parties were arrested in the woods near Greensboro, and the court erred in permitting the introduction of the said card in the evidence.

XVII.

The court erred in refusing to strike out the evidence of the witness Daniel relative to his own acts or conduct, or the appearance of the defendant Hawley, subsequent to the arrest of either of the defendants Howard and Daley in the woods near Greensboro.

XVIII.

During the cross-examination of the witness Daniel, he was asked by defendants' counsel this question, "What is exclusively used in an assayer's outfit that is not used in anything else?" And he answered, "I do not know that you could find anything that could not be used for something else;" and his honor thereupon
206 refused to permit the further examination of the witness as to what constitutes a complete assayer's outfit, for the reason that the witness had stated that he did not know what constituted a complete assayer's outfit. In this the defendants submit that the court erred to their injury and prejudice and they assign the same for error.

XIX.

The court erred in permitting the State's witness Henry Whitfield to testify as to a conversation between himself and the defendant Daley in the absence of the defendants Howard and Hawley in the Guilford hotel, in March, 1901.

XX.

The court erred in permitting the State's witness, Dr. J. P. Turner, coroner of Guilford county, to testify concerning the trunk and its contents found in the room of one of the defendants after the arrest and incarceration of the defendants, and to the introduction of the said trunk and its contents.

XXI.

That the court erred in permitting Messrs. King & Kimball, who were retained by the witness, Paul Garrett, to prosecute the defendants in a civil suit, growing out of the transaction between them and Garrett and here being prosecuted criminally, to appear with and assist the prosecution of the defendants being retained so to do by Paul Garrett.

207 XXII.

The court erred in permitting the State's witness, John Thompson, to testify that he had made an analysis of the borings taken from the alleged gold bricks or bars and as to the result of the said analysis, and the court erred in receiving in evidence the said alleged gold bricks or bars and the cloths in which they were bound or wrapped.

XXIII.

At the close of the evidence offered by the State, the solicitor for the State elected to rely upon the first count in the indictment and entered a *nolle prosequi* as to the second and third counts, whereupon the defendants through their counsel, informed the court that they would offer no evidence for the defendants, and moved the court to instruct the jury that upon the evidence adduced in the cause the defendants, as a matter of law, were not guilty, and the jury should

so find and return their verdict accordingly. This motion was refused and to the ruling of the court therein, the defendants assign error.

XXIV.

The court erred in refusing to give the instructions prayed for by the attorneys and counsel for the defendants in the following instances:

1. To constitute an indictable conspiracy there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. This definition of a conspiracy being applied to the
208 case now before the jury means that the conspiracy alleged to have been entered into by the defendants must have been done with the intent either to cheat or defraud or to rob an innocent person, who did not know of its existence, of his property, or to deprive an innocent person of his lawful rights; so that if the jury find that Paul Garrett, the party whom it is charged in the bill of indictment the defendants conspired to cheat or rob of his property, entered into the contract as alleged with Howard with the knowledge or belief on his part that it was fraud that was attempted to be perpetrated upon him, then I charge you that he is not such an innocent person as is contemplated by law, and the defendants would not be guilty, even although the alleged combination was to cheat or defraud Paul Garrett.

2. The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment herein consists in its criminality under the law in the means alleged to have been agreed to be employed by the defendants in the obtaining of the money of one Paul Garrett, and that as to such count it devolves upon the State in the first instance to prove by the evidence beyond a reasonable doubt that the defendants had actually agreed between themselves upon the means charged in said count to obtain of the witness Garrett his money, that is, secretly and with deceit and fraudulent intent and by false pretenses, subtle means and devices of a subsisting fact, the truth of which was unknown to the witness Garrett and which was intended to and capable of deceiving a person of ordinary prudence, exercising at the time ordinary care; and unless you so find and believe from the evidence in this case you shall acquit the defendants.

3. The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictments consists
209 in its criminality under the law in the means therein alleged by the State to have been agreed upon by the defendants whereby to obtain the money of one Paul Garrett, and that in such case the burden is upon the State to prove beyond a reasonable doubt every essential element of the offence thus charged against the defendants and show that the means there charged were actually agreed to be employed by the defendants as a means of obtaining from the witness Paul Garrett his money with the intent wickedly

and maliciously to defraud him of it; and unless you find from the evidence that such was the agreement between the defendants so to cheat and defraud the witness Paul Garrett of his money, then you will find the defendants not guilty; and the jury are further instructed that in considering the evidence adduced before you by the State in this cause as applicable to the first count of said indictment, you should take into consideration the situation of the parties, their acquaintance with each other, of the probability or improbability of the story related by the defendant Howard to the witness Garrett at Weldon, the impression, if any, it made upon his mind, the assent of Garrett thereto and his knowledge of the scope and effect of the agreement assented to, and its nature and his participation therein, and if from such impression he was likely to be or was deceived thereby into the belief of the truth thereof, and whether the same was calculated to and capable of inducing him to part with his money to the defendants; and if you find from the evidence that such story as was then related by Howard to Garrett, that he, in the exercise of ordinary prudence, should have known or did know was false, and that knowing its falsity he then and thereafter encouraged by his words and conduct the defendant Howard to believe that he, Garrett, believed in
210 such story, and on such pretense advised and encouraged the defendant Howard into taking further steps of an apparent attempt to obtain the money of Garrett by and through the means suggested in the story related to him by the defendant Howard, and that in pursuance of such statements and requests by Garrett the defendant Howard came to the city of Greensboro in Guilford county and prepared himself with his codefendant, A. L. Daley, to show the witness Garrett the property in question and under inducements laid and held out by Garrett to the defendant Howard did transmit to him, Garrett, a telegram prepared and written by the witness Garrett, addressed to himself, whereupon the witness Garrett came to Greensboro, and with the defendant Howard went to see the property so situated and described to him; and that arriving at the place where the defendant Daley, disguised as an Indian, and the property so spoken of, was, and that while weighing and examining it, the witness and a sheriff's posse arrested the defendants Howard and Daley; in that event the court instructs you as a matter of law that the confederation or agreement between the defendants to so exhibit to him the said property was not an unlawful or criminal conspiracy, and this without respect as to what motive the defendants had or may have had in so arranging to exhibit to the witness Garrett the property in question, and that the acts, conduct and agreement of the defendants in this respect were not criminal under the law, and you should find them "not guilty."

4. The court instructs the jury that if you find from the evidence that about March 20th, 1901, the defendant Howard called upon the witness Garrett at his place of business in the town of Weldon and related to him a story respecting his, the defendant Howard's
211 ownership of a mining property and gold taken therefrom, and of the relationship of a former partner by the name of

Garrett whom he was seeking for the purpose of enlisting him in the business of developing said mining property, and disposing of the product thereof, then stated to be in the possession of an Indian at the time being in the city of Greensboro, and that from the relating of such story by the defendant Howard, the witness Garrett either knew, or in the exercise of ordinary care, precaution and prudence, might or should have known, the same was false and related to him for the purpose of obtaining and defrauding him of his money, and that knowing or believing it at the time to be so he, the witness Garrett, falsely pretended belief of and confidence in, the story so related to him, and that it was intended to cheat and defraud him of his money, and that so believing, he, Garrett, encouraged and advised the defendant Howard into taking further steps with respect to developing such plot as was disclosed in the story related by Howard to the witness Garrett, and that Garrett aided the defendant Howard in arranging the details and creating the situation of exhibiting to the witness Garrett the property in question at or near the city of Greensboro, the court instructs you as a matter of law that nothing said or done or agreement entered into by or between any two or more of the defendants pertaining to the proposed transaction with the witness Garrett subsequent to his knowledge or belief in the falsity of the story related to him by Howard, are acts and agreements between the parties of which the witness Garrett may in law not be heard to complain, and that the transaction which occurred subsequent thereto concerning which the witness Garrett had participated in arranging for, was not criminal; and this irrespective of what was or might have been
212 the intention or motive between the defendants in carrying out the details of such arrangements or the representations subsequently made to him by any one or more of the defendants with respect to the quality or the condition of the property in question or what they intended to do with the same, and you should find the defendants "not guilty."

5. The jury are instructed that if they find from the evidence in the case that at the time the witness Garrett was approached by the defendant Howard at Weldon or during the conversations and transactions there had between them the witness Garrett then and there became satisfied and knew that the defendant Howard was proposing to him a scheme which was patently and evidently a fraud and a sham, and that knowing this to be true the said witness Garrett for the purpose of gain, or taking his chances upon making money out of such scheme and plan as then proposed by the said defendant Howard, willingly and voluntarily entered into the same for such purpose and encouraging or in any way furthering the said enterprise, scheme or plan so known to him to be false and fraudulent, and then and there in any way directed or advised the said Howard how to proceed, or agreed to accept the proposition then and there advanced and proposed by the defendant Howard to him, the said Garrett, and undertook and agreed to become interested therein as a partner or shareholder for the purpose of furthering the said enterprise, scheme or plan with the hope of gain to himself, and that the

said Howard then and there distinctly told the said Garrett that the object of the said enterprise, plan or scheme did not contemplate the advancement, contribution or investment of any money whatever by the said Garrett, but that all he, the said Garrett, was expected to do in connection with the said enterprise, scheme or plan was
213 that he, the said Garrett, should manage and direct the same, and that the said Garrett with all these facts before him willingly and voluntarily assented thereto and advised the said Howard how he should further proceed in the matter, and that Howard thereafter acting in obedience to the suggestions of the said Garrett came to Greensboro, and while here and promising him full compensation for his services while engaged in the furtherance of the said enterprise, scheme or plan, and that the said Garrett, as a matter of fact, was never cheated or defrauded or robbed of a cent by the defendants or any one of them, but in the furtherance of the said scheme or plan, he, the said Garrett, had accepted the money of the said Howard to cover expenses of his said trip to Greensboro in furtherance of said plan or scheme, then and in that event there would be no criminal conspiracy as charged in the indictment, but the defendants as a matter of law would not be guilty and it is the duty of the jury so to find.

6. If the jury should find from the evidence that the prosecuting witness, Paul Garrett, in pursuance of an arrangement voluntarily entered into by him with the defendant Howard at Weldon, came to the city of Greensboro in the furtherance of an enterprise, the details of which were fully made known to him by the said Howard at Weldon, and assented to by the said Garrett, and out of which the said Garrett was to receive compensation equal to that of the said Howard and his copartner, A. L. Daley, and that the expenses of the said Garrett were paid in advance, and it was further made known to him at Weldon and at Greensboro after his arrival here that no money was expected from him but he was simply to take charge of the business and manage it, as one possessing superior intelli-
214 gence and capacity, and that he gave his full and free assent to the same, and that upon his arrival in Greensboro, he, and the said Howard, in pursuance of their previous arrangements and agreements, repaired to the place where the property in question was to be exhibited for the purpose of allowing the said Garrett to inspect it, and in accordance with the terms of the said agreement as aforesaid made known to him, the said Garrett, at Weldon, and that in furtherance of the said plan and agreement Howard and the said witness Garrett proceeded to the inspection of the property in question, and that while they were therein engaged the defendants Howard and Daley were interrupted, interfered with and arrested before the said inspection was completed in accordance with the agreement heretofore made between the said Howard and Garrett, which interruption and arrest was instigated by the said Garrett and planned and concocted by him before he left the town of Weldon and for the mere purpose of trapping the defendants, then and in that event the said agreement would not be a criminal conspiracy, and the jury should find the defendants "not guilty."

7. The court instructs the jury that although you may find from the evidence that the defendants actually came together and in terms agreed to obtain of Paul Garrett his money by false pretences and to cheat and defraud him, yet if you further find from the evidence that when the false statements and pretences were made by the defendants to the witness Garrett they were such as he knew at the time to be false or by the exercise of ordinary care and prudence should have known to be false, and with such notice and knowledge on his part he assented to the requests and demands of the defendants in the hope of profiting himself thereby, then you will
215 find that the transaction as between the parties was lawful and the defendants not guilty, under either count of the indictment.

8. The jury are instructed that it is not unlawful for two or more parties to come to terms of agreement between themselves to interest and enlist with them another person in the conduct and furtherance of their business or undertaking; or, if such other person has explained to him and understands the means and process to be used in the accomplishment of the proposition in which he is about to engage, and assents to, and assumes the chances of gain to himself in engaging with such others in the furtherance of such enterprise, then there is no such false or fraudulent representations or statements made to him as will constitute the offence of conspiracy to cheat and defraud him of his money or property; and if you find from the evidence that the defendant Howard explained to the witness Garrett a scheme which he proposed to Garrett to assist in the furtherance of, and to which scheme the witness Garrett then gave his assent and approval, undertook and agreed upon terms of compensation then proposed to him, to engage in the furtherance of, in connection with Howard, and the said defendants, in the hope thereby of gain and profit to himself, then you will find the defendants "not guilty."

9. The court instruct the jury as a matter of law that it is not unlawful or criminal for two or more persons to come to terms and agree together to interest and induce another person to become interested and promote conjointly with them any matter or thing not in itself unlawful, and if you find therefore from the evidence that the defendants, through the defendant Howard, represented and proposed to the witness Garrett a scheme, project or business
216 which as explained was apparently lawful and proposed to engage the services of the witness Garrett in the promotion and furtherance thereof upon terms profitable to the said Garrett that they had a lawful right to do so, and if you further find from the evidence that the said Garrett gave his voluntary and free assent to the promotion and carrying out of the project for business thus proposed to him, you will find the defendants "not guilty."

10. The jury are instructed that it is not unlawful for two or more persons to agree together to interest with them another person in the promotion and carrying out of any enterprise of advantage and profit to such other person or to hire such other person on terms of compensation to assist them in the transaction of business, and if you therefore find from the evidence that two or more of the defendants

explained to the witness Garrett the nature of the business in which they desired his services, and that fully understanding the matter, the witness Garrett undertook and agreed to serve the defendants in the promotion and furtherance of the enterprise and business thus explained to him upon terms of advantage and profit to himself, then, as a matter of law, he had a right so to contract, and in doing so assumed all the risks and burdens incident to such contract, and if you so find and believe from the evidence in this case, you shall find the defendants "not guilty."

11. The court instructs the jury that if you find from the evidence that the witness Garrett had explained to him by any one of the defendants the nature and object of the business they were intending to promote regarding which they sought and desired his services, and that having the matter so explained to him he undertook and agreed upon terms of advantage and profit to himself to join the enterprise, business or undertaking of the defendants, and which was thus explained to him, then you will find, as a matter of
217 law, that the defendants had a perfect right so to interest and engage with them the witness Garrett in its furtherance and promotion, and that if he came to terms and agreed with any one or more of the defendants to become so interested with them in the promotion and furtherance of their enterprise, that, as a matter of law, he had a right to do so, and they had a right to so engage him and that he with them assumed and undertook all the hazard and chances of the future of such enterprise, and you should therefore find the defendants "not guilty."

12. The jury are instructed as a matter of law that parties have a right to seek each other out, contract and agree with each other with respect to any business or undertaking looking to the mutual betterment of their condition; and if you therefore find from the evidence that any one or more of the defendants sought out and explained to the witness Garrett the nature of the business in which they desired his assistance to promote and upon the same being explained to him, the witness, Garrett, assented thereto, and agreed in the hope of profit to himself to embark therein and join one or more of the defendants in the promotion thereof, then you will find, as a matter of law, that the transaction between the parties was lawful, and you should find the defendants "not guilty."

13. The indictment in this case charges the defendants with a conspiracy to falsely cheat and defraud Paul Garrett out of his money by what is known to the law as "false pretence," and a false pretence is a false representation by one person to another of a subsisting fact which is calculated to deceive the person to whom the representation is made, and which actually does deceive him, in consequence of which deceit he parts with his property, so that before the jury can convict them they must find the fact to be
218 that the defendants fraudulently combined and conspired with each other to make a false representation of some subsisting fact to Paul Garrett, the falseness of which was unknown to Paul Garrett, and which Paul Garrett believed to be true, and in

case you do not find this to be the fact it will be your duty to return a verdict of "not guilty."

14. The defendants are presumed to be innocent of all the charges against them until they are proven guilty by evidence which satisfies you beyond a reasonable doubt of their guilt; and this presumption of innocence is raised by law in their favor and is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the defendants are entitled.

15. This presumption of innocence is evidence in favor of the defendants introduced by the law itself in their behalf and it continues in their favor until the end, unless it is overcome by such competent proof as satisfies the jury beyond a reasonable doubt of the defendants' guilt.

16. Unless, therefore, this presumption of the defendants' innocence, which is evidence introduced by the law in their behalf in this case and which must be considered by the jury as evidence of their innocence, is overcome by competent proof which establishes the defendants' guilt in that degree and to that extent which removes from the mind of the jury all reasonable doubt of their guilt, it will be the duty of the jury to return a verdict of "not guilty."

17. As to a reasonable doubt, the court instructs you that in this particular case, if upon considering all the evidence, you can say that in their acts and doings as found by you the defendants were actuated by any other motive than to cheat or defraud Paul
219 Garrett, and to obtain from him any money or other thing of value, as, for example, if their object and intention was to induce Paul Garrett to join *in* with them in an effort to cheat or defraud some one else, then it would be your duty to adopt that theory or that motive and that would be a reasonable doubt, and it would be your duty to return a verdict of "not guilty," and in passing upon this question it is proper that you should consider, if you find the facts so to be, that the defendants never asked Paul Garrett to advance any money; that Howard paid his expenses to come to Greensboro; that Howard told him that he would pay his expenses to go to Philadelphia and attend to their business for them and would share with him any profits that they might make.

19. While it is not necessary, in order to convict the defendant in this case, that they should have actually obtained from Paul Garrett any money or other thing of value by false and fraudulent representations, still before the jury can convict, they must be satisfied beyond a reasonable doubt, as above explained, that there was an unlawful conspiracy and agreement between the defendants to endeavor by false and fraudulent representations to obtain money from him, and the jury must further find that the false and fraudulent representations agreed to be used by the defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett.

20. A mere false affirmation of the value of any article is not indictable and the pretence to be criminally false, must be of a past

or subsisting fact, capable of deceiving a person of ordinary caution and prudence; so that your inquiry will be, was Paul Garrett
220 a man of ordinary caution and prudence, such as the representation of Howard was capable of deceiving;—and in passing upon this question it is your duty to consider whether it did deceive him; consider his demeanor on the witness stand; his telegram to the chief of police in Richmond; his letter to Patterson; the fact that he admits he sent Mims to Greensboro before he came himself; his instructions to Mims, and his conversation with Patterson after his arrival in Greensboro; the fact that he says he was satisfied Patterson and Mims would be at the meeting place between him and the defendants, Howard and Daley, for his protection; and the fact that he testifies that as Howard left his office in Weldon he told his clerks to look out of the window if they wanted to see a gold-brick man.

21. If the jury shall find from the evidence, at the time Paul Garrett agreed with Howard in Weldon to attend to the business for him and his alleged partner of selling their gold and aiding them in the purchase of machinery to work the mine, he knew or had reason to believe that a fraud was intended, and he came to Greensboro ostensibly to further that fraud, but really for the purpose of entrapping the defendants that he might have them arrested and that he was not defrauded or cheated out of any money or other thing of value by the defendants or by the false representations agreed to be made by them, then the court instructs you that no crime has been committed, and it will be your duty to return a verdict of "not guilty," and in passing upon the question of the contract and agreement between Howard and Garrett, it is your duty to consider the two telegrams which were written by Garrett himself and given by him to Howard to be sent back to him (Garrett), and also to consider the fact that Howard gave to Garrett $10
221 and agreed to pay all expenses which that sum did not cover; and in passing upon the question of the knowledge and belief of Garrett, you will consider the telegram sent by him to the chief of police in Richmond and the letter written by him to the attorney general in Richmond, and the letter written by him to A. C. Patterson, and the sending by him of a Mr. Mims of Weldon to Greensboro, and such other acts done by him looking to the apprehension and arrest of the defendants.

22. The court further instructs the jury that upon the evidence adduced in this case the defendants, as a matter of law, are not guilty, and the jury should so find, and return their verdict accordingly.

XXV.

The court erred in refusing to respond to the instructions prayed by the defendants, and in failing to assign any reason, as a matter of law, for such refusal.

XXVI.

The court erred in using the following language in his charge to the jury:

1. "By pursuing this course, no possible wrong can be done the defendants, as an error committed by the court in instructing you upon the law in this case can, if the defendants feel aggrieved thereby, be corrected on appeal to our supreme court;" in that this language amounted to an expression of opinion of the court that the defendants were guilty.

2. "The statute of 33 Edward 1st *de conspiratoribus*, which statute has been commented upon by counsel for the defendants, was only declaratory of the common law to the extent of the crimes enumerated, leaving the common law as applicable to all
222 other forms of conspiracy known to the law. Not only have the courts of England acted upon this interpretation of the law, but every State in this Union where the common law prevails, so far as the court is advised, has acted upon and upheld this interpretation of the law of conspiracy. To do otherwise in States that rely upon the common law and which have no statute broad enough to cover all forms of conspiracy would be to say that many objectionable and dangerous conspiracies could be formed and their ends consummated and yet the law be impotent and powerless to prevent or punish such;" because by this language the jury must necessarily have inferred that his honor meant that whether conspiracy was an offense by the common or statute law of North Carolina, the defendants were guilty.

3. "It is a rule of law well established that all who engage in a conspiracy, as well *as* those who participate after it is formed as those with whom it originates, are equally liable and the acts and declarations of each in furtherance of the common illegal design are admissible against all. Every one who enters into a design, in other words a conspiracy, is equally deemed in law a party to every act which may afterwards be done by any of the others in furtherance of such common design."

4. "Reference has been made by counsel for the defense to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence as disclosed by the testimony of Garrett satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud
223 him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law."

5. "If he (meaning the witness Paul Garrett) comes to detect and apprehend the defendants in the commission of an intended crime his course is not only proper but is commendable. If he came under the impression that the business transaction was a legitimate

and honest one by means of which he would be able to acquire a legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism."

XXVII.

The court erred in holding, as a matter of law, that the offense with which the defendants were charged and of which they were found guilty by the jury was a felony.

XXVIII.

The court erred in punishing the defendants by sentencing the defendants Howard and Hawley for ten (10) years' hard labor in the State's prison, and the defendant Daley to seven (7) years' hard labor therein, the offense of conspiracy being only a misdemeanor in North Carolina. The punishment imposed by the court is therefore unlawful, cruel and inhuman, and in violation of article 1, 224 section 14, of the constitution of North Carolina, and of article 8 of the amendments to the Constitution of the United States.

XXIX.

The court erred in overruling defendants' motion to set aside the verdict of the jury and for a new trial in said cause.

XXX.

The court erred in refusing defendants' motion in arrest of judgment.

The foregoing statement, together with the record proper and the affidavit of defendants and the order of the court allowing the defendants to appeal *in forma pauperis*, is to constitute defendants' case on appeal.

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North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of North Carolina, do hereby certify the foregoing to be a true and correct copy of the printed record, in the case of The State against J. L. Howard and Others, on file in this court.

Given under my hand and seal of said court at Raleigh, this the seventh day of December, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Cl'k Supreme Court of N. C.

Endorsed on cover: File No. 18,511, E. North Carolina C. C. U.S. Term No. 312. J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley, appellants, *vs.* Captain J. M. Fleming, warden of State's prison of North Carolina. Filed April 23, 1902.